91-717

NO.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DOMINIC SENESE
JOSEPH TALERICO

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Justice Department can file a civil RICO action against an International Union, and its International Officers, not include the local unions or its membership as parties, and by settlement with the International Officers through a Consent Decree, carry out the purposes of the RICO action, take over its major executive functions, amend its Constitution to enhance disciplinary provisions of said Constitution, have veto power over appointment of Officers, and still maintain that its Court appointed administrator, who is a conceded **"quasi-governmental"** actor, performs a private function in the disciplinary expulsions of union members and that such function is not **"state action"**, thus barring Petitioners from First, Fifth and Eighth Amendment rights, merely because the settlement required the

Union to compensate said Administrator.

2. Whether the government's use of the Civil RICO Statute to eradicate union members from the union for association with other persons of Italian-American origins without regard to the commission of any offense forbidden by the RICO Statute, renders such use of the Statute a violation of the rights to **"freedom of association"** and **"due process"**, resulting in disproportionate punishment, and under the circumstances, a Bill of Attainder.

3. Where the purpose of the government's civil RICO action against an International Union is to purge from it targeted persons whom the government believes to be involved with LCN (organized crime) a **"recognizable class of persons"** on the basis of association without any showing that such Union members were involved in any violation of the RICO Statute, debarring them for life, does not

such purpose render the RICO Statute, or its use here in force and effect, a Bill of Attainder.

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1991**

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**DOMINIC SENESE**
**JOSEPH TALERICO**

**Petitioners,**

**UNITED STATES OF AMERICA,**

**Respondents.**

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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TO: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

**PRAYER**

The Petitioners, **Dominic Senese and Joseph Talerico**, Defendant-Appellants in the Court below, respectfully pray that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Second Circuit entered in this case.

## OPINION BELOW

The Opinion of the United States Court of Appeals for the Second Circuit affirming the Decision of the United States District Court for the Southern District of New York, was entered on August 6, 1991, and reported at 941 F.2d 1292, (2nd Cir. 1991) and is reproduced hereto as App. A. The District Court's Opinion is at 745 F.Supp. 908 and a Supplemental Opinion at 753 F.Supp. 1181.

## CONSTITUTION

U. S. Const., Amend 1:

> **"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.**

U. S. Const., Amend V:

> **"No person shall be . . . deprived of life, liberty, or property, without due process of law; * * ***

U. S. Const., Amend VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATUTES

28 U.S.C. SEC. 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

29 U.S.C. SEC. 504(a)(2)

"(a) Membership in Communist Party; persons convicted of robbery, bribery, etc.

"No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, any felony involving abuse or misuse of such person's position or employment in a labor organization or employee benefit

> plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve --"
>
> * * *
>
> "(2) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, employee, or representative in any capacity of any labor organization."

## PARTIES TO THIS PROCEEDING

The caption of this case in this Court contains the names of all parties.

## JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Second Circuit was filed on August 6, 1991. This Petition is filed within 90 days thereafter. The jurisdiction of this Court is invoked under Title 28 U.S.C. #1254(a).

## STATEMENT OF THE CASE

### The Proceedings Below.

On March 14, 1989, Judge Edelstein of the Southern District of New York entered a Consent Decree **(the DECREE)** settling civil racketeering charges brought by the government against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (**"IBT"**) and members of the IBT General Executive Board. (**"GEB"**) These Petitioners and the local unions of which they were members,were not made parties to this litigation.

A central feature of the Decree was the establishment of three Court appointed offices to oversee the IBT's internal affairs pursuant to the RICO action. The Decree provided for an Independent Administrator **(the IA)** to oversee the Decree's remedial provisions. Second, it provided for an Investigations

Officer (IO) to bring charges against corrupt IBT members, and an Elections Officer to oversee the electoral process leading up to and including the election for International Officers at the 1991 IBT Convention. Finally, the Decree provided **"enhanced provisions"** for disciplinary proceedings. (See U.S. v. IBT, 905 F.2d 610 at pp. 612-13)

On November 30, 1989, the Investigations Officer charged Senese and Talerico with violating the IBT Constitution **"by conducting (themselves) in a manner to bring reproach upon the (IBT)"**. At that time Senese Age 74, an IBT member for 40 years, was the President of IBT Local 703 in Chicago and Talerico Age 74, an IBT member for 23 years, was a Business Representative for Chicago IBT Local 727.

The basis for the charges against Senese was his alleged association with La Cosa Nostra (LCN) and with certain members thereof.

The charge against Talerico was based upon his refusal to answer questions before a Federal Grand Jury investigating a skimming operation in a Las Vegas Casino in 1982 and his knowing association with one Philip Ponto, upon five occasions for about ten minutes each in Las Vegas, Nevada in 1980, a person whom the FBI contends is a LCN member. None of these alleged meetings were shown in any way to be involved with Union activity.

The IA held a Hearing on the charges against Senese and Talerico on March 22 and 23, 1990. In support of the charges the Investigations Officer relied solely upon the testimony of a Special Agent of the Federal Bureau of Investigation and an Affidavit of another Agent who did not appear to testify.

As a result of the Hearing, the IA issued a Decision finding just cause to sustain the charges against the Petitioners. As a

sanction he permanently removed Senese and Talerico from all of their IBT positions, expelled them from the IBT and prohibited them from drawing any money from the IBT or its affiliates, which would include the AFL-CIO. On July 12, 1990, the IA submitted his Opinion to the District Court (Judge Edelstein) and on August 27, 1990 the District Court issued an Opinion and Order upholding the IA's permanent expulsion of Senese and Talerico. Senese and Talerico appealed from the Orders of the United States District Court for the Southern District of New York and to the United States Court of Appeals for the Second Circuit which affirmed the orders of the District Court on August 6, 1991.

**STATEMENT OF RELATED CASES AND PROCEEDINGS**

Other litigation arising under the Consent Decree include the **United States** v. **IBT** a Petition for Certiorari from the Second

Circuit Court of Appeals in this Court under No. 90-1904 (filed June 24, 1991); **United States** v. **International Brotherhood of Teamsters**, 907 F.2d 277 (2d Cir. 1990).

**United States** v. **International Brotherhood of Teamsters**, 899 F.2d 143 (2d Cir. 1990); (Ligurotis contempt); **United States** v. **International Brotherhood of Teamsters**, 905 F.2d 610 (2d Cir. 1990);(Friedman & Hughes); **Joint Council 73** v. **International Brotherhood of Teamsters**, Case No. 89-5094 (filed December 8, 1989 D.N.J.); **U.S.** v. **IBT**, 745 F.Supp. 908 (DC S.D.N.Y.).

## STATEMENT OF FACTS

This case involved the permanent expulsion of Petitioners Dominic Senese and Joseph Talerico for bringing **"reproach"** upon the Union pursuant to a provision of the IBT Constitution. (**App. 26**) The only provision for expulsion from membership in the

Constitution relates to communists, Art. II, Sec. 3(a). **(App. 27)**

All the testimony concerning the activities of the Petitioners was presented in the form of FBI Reports, FBI Physical Surveillance Reports, Statements secured from third parties in other investigations produced by a single FBI Agent deemed to be an **"expert"** by the IA and who was permitted to testify concerning his opinion as to membership in LCN. There is no evidence that any such conclusions of the FBI were ever made public, so that persons having contact with people who met the FBI **"criteria"** were on no notice that they were **"associating"** with a member of LCN. There is no evidence as to how Petitioners **"knew or should have known"** of the FBI determination of LCN members, yet, both the IA and the District Court below made such findings.

The sole evidence of the contempt charges against Talerico consisted of records from the U. S. District Court for the District of Nevada. These included documents relating to the proceedings in the civil and in the criminal contempt cases, both of which arose from the same Grand Jury out of his mere refusal to testify, and despite a grant of immunity he persisted in his Fifth Amendment rights. The order of conviction clearly indicates a plea of nolo contendere to the criminal contempt charge for which he was given a 90 Day sentence to run concurrently with the Civil Contempt. Over objection by Talerico, this document was accepted by the IA and approved by the Court below, as the sole proof of criminal contempt, notwithstanding the command of Rule 11 of the F.R. of Cr.P., which was raised at the Hearing.

Talerico was released from both civil and

criminal contempt on November 7, 1984. He served a total of 496 days.

## ARGUMENT

### 1. STATE ACTION

In the Court below all Briefs were filed in the Second Circuit prior to June, 1991. On June 3, 1991, this Honorable Court decided Edmonson v. Leesville Concrete Co., Inc., (111 S.Ct. 2077), a **"state action"** case. The Court below referred to it in a footnote of its Opinion as **"inapposite". (App. 13)** We respectfully disagree. However, in that Court's footnote it concedes that the IA is a **"quasi-governmental actor"** but states that he was **"performing a private function under the IBT Constitution". (App. 13)**

The Court below relies on the fact that because the Decree imposes upon the IBT the requirement that it compensate the IA that therefore the IA is not a governmental actor.

**(App. 13)** The Court below states that the IA has offices that are provided by the IBT and that the IBT pays his salary, hence his position is under the control of the IBT and remains a private, not a governmental role. **(App. 13)** The IA's offices are located in New Jersey as are the offices of the IO.

While the Consent Decree established these positions, they are scarcely under any control of the IBT. In point of fact the IA controls all major executive functions and decisions regarding the appointment and rejection of IBT personnel.

More importantly, an analysis of the impact of the RICO suit on the IBT demonstrates that the Union is being operated by the IA under the supervision of the District Court with the United States as a party to any enforcement aspect of the Consent Decree. All matters before the District Court

relating to any phase of the operation of the IBT under the control of the IA pursuant to the Consent Decree has, as a principal party, the United States.[1]

The Court below further, at App. 12, states that the authority of the IA **"to impose the sanctions stemmed from the post-decree amendments to the IBT Constitution"**. These amendments were thrust upon the IBT by the United States and were a part of the original purpose of the RICO action, which was to rid the IBT of those whom the Justice Department or the FBI considered to be members or associates of LCN.

All amendments pursuant to the Consent Decree were made retroactive. The changes in

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[1]All appeals or remedies sought by an effected local or a member throughout the United States must be processed in the Southern District of New York under the root case, U.S. v. IBT, 88 CIV 4486 (DNE) and employ local counsel. This procedure has had a chilling effect on members aggrieved.

time limitations to bring the disciplinary actions against Senese and Talerico are critical. The membership, according to the IBT Constitution, had a right to reject any amendments.

At the Convention which occurred in June, 1991 the IBT was advised that any attempt to overrule or reject these imposed amendments would be given **"no legal effect"** by the District Court. **(App. 33-34)**

These Amendments which were imposed as a result of the Settlement can hardly be said to be the will of the membership. The settlement reflected the desire of the General Executive Board Officers to save their own positions, salaries, and benefits.

We respectfully ask this Court to take judicial notice of a pending case in this Court as of the time of the drafting of this Brief. The case is **United States of America**

v. **IBT** bearing the same caption as the case at bar. It is a Petition for Writ of Certiorari filed on June 24, 1991 and bears the No. 90-1904. Your Petitioners have examined the Brief and record in that case and wish to call the Court's attention to proceedings which occurred subsequent to the finality of judgment in this case, but are exceedingly important to the showing of State Action. The pertinent portions are reproduced herein as App. 31-34.

2. **SUBSTANTIVE CONSTITUTIONAL RIGHTS**

The Court below recognized that the key issue of this case is **"state action"**, but further erred in an offhand attempt to minimize the Constitutional violations involved without any specific response to those issues. They are real and they are substantive violations of the **"freedom of association"** and **"due process"** and a form of

disproportionate punishment recognizable under the Eighth Amendment. No disciplinary action could have been sustained except by the device employed against Petitioners.

**a. First Amendment**

The permanent debarment from the Teamsters Union is a penalty far beyond the purview of Title 29 U.S.C. Sec. 504. That section provides that in addition to a member of the Communist Party, no one who is convicted of robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotic laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury or a violation of certain sections of the subchapter and any felony involving abuse or misuse of such person's position or employment in a labor organization or employee benefit plan can hold a union or union related office. The LCN is

not included in that Statute. No where does it provide for any such member's debarment.

The only provision of the Teamsters Constitution which permits someone for being expelled for "**association**" is to be found in Article II, Sec. 3(A). **(App. 27)** This provision relates only to members of any party or group which advocates the overthrow of the Federal, State or Provincial Government by force and violence.

The term "**association**" as used here and the special factual circumstances of this case constitute an absolute violation of their rights under the First Amendment. See **NAACP** v. **Alabama, ex rel Patterson**, 357 U.S. 449, 460 (1958); **NAACP** v. **Alabama, ex rel Flowers**, 377 U.S. 228 (1964).

The District Court below in its Opinion stated that the Union members' First Amendment rights are curtailed by provisions of the

LMRDA, which section preserves for labor unions the right to enforce reasonable rules as to the responsibility of every member toward the organization as an **institution** and to sanction its members for conduct that would interfere with **its performance of its** legal or contractual obligations. (745 F.Supp. 908 at 912)

There was absolutely no evidence that any of the charges as to these Petitioners had anything to do with the labor organization as an institution, or in anyway interfered with the performance of its legal or contractual obligations.

**b. Fifth Amendment**

**i. Contractual Violation**

The IBT Constitution provides very specific procedures for the adoption of Constitutional Amendments. Article III, Section 9(b) **(App. 27-28)** provides that

Amendments are to be made by a majority vote of the delegates to the International Convention. This of course did not occur. The Amendments in controversy were simply adopted in the Consent Order as executed by members of the General Executive Board and by the Government in contravention of the contractual rights of the affiliates and the members.

An International Union's Constitution is an enforceable contract not only between the membership and each local union, but among all local unions and other subordinate entities and between the International Union and its affiliates. This view has prevailed in the Federal and State Courts for almost half a century, and was clearly the prevailing view at the time of the enactment by Congress of the major pieces of federal legislation regulating labor relations and unions in this

country. **United Association of Journeymen & Apprentices** v. **Local 334**, 452 U.S. 615 (1981) at pp. 619-22; **Machinists** v. **Gonzales**, 356 U.S. 617, 618-619 (1958).

The contractual nature of the IBT Constitution in this case dictates that the rights and obligations it creates cannot be removed or modified without consent of the parties. And while the International Officers with a clear conflict of interest purported to give away the rights of the members, we respectfully urge that they had no authority so to do.

Under due process it is clear that the Petitioners were deprived of substantial liberty and property interests within the meaning of the Fifth Amendment, as the Union Constitution are enforceable as contracts.

**ii. Right of Confrontation**

Both Petitioners were deprived of the

right of confrontation, as the only person who testified live was FBI Agent Wacks who was permitted to give hearsay testimony and hearsay upon hearsay testimony. The situation here is a clear violation of this Court's ruling in **Greene** v. **McElroy**, 360 U.S. 474, 493, 496-500, 507-508 (1959) The testimony in addition to inadmissible hearsay includes statements by deceased witnesses, newspaper reports, documents, such as FBI Reports which themselves are inadmissible hearsay documents, in which further contained layers of inadmissible hearsay from other sources named and unnamed. Not one piece of evidence was presented by a live witness subject to cross-examination who had personal knowledge of any of the charges made against them. Contrary to the opinion of the Court below, Petitioners do contest the reliability of the evidence admitted during the proceedings, over

strenuous objections.

**iii. Vagueness**

Due process requires notice that certain conduct is prohibited and will subject a person to sanctions. The proceedings show that the FBI used a definition of LCN membership known only to itself. See testimony of Wacks. **(App. 29)** How is anyone to know that **"association"** with persons secretly designated by the FBI brings **"reproach"** upon the IBT. On what basis did the Courts below find **"knew or should have known"** that such a person was a member of the LCN. There is no basis asserted.

The vagueness of the term **"association"** when coupled with the terms **"to bring reproach upon the union"** have never been interpreted. The words to bring **"reproach upon the union"** have no meaningful standard. The only interpretation even made was offered by the

General Executive Board on November 1, 1989 and was rejected by both the IA and the Court below.

These matters raise substantive questions of **"due process"**.

**iv. Retroactive Application**

The stated policy of the IBT to be free from the influence of organized crime was language which was inserted into the Consent Decree entered into in 1989. How can the prospective nature of a Consent Decree prohibit conduct which occurred at a time which precedes the Decree. The time period for Senese was 1984, but the time period for Talerico was 1980 for the **"association"**, and the contempt hearings in 1982 and 1984.

Consent Decrees are prospective in nature as the prohibitions **"permanently enjoin * * * knowingly associating with any member or associate * * * of the Cosa Nostra"** The cases

cited by the government, the Decision of the IA and the Court below, in support of the retroactive effect of the orders of debarment, relate to parole and license cases where clear notice is given as to parolee conduct before release, which is prohibited, or past conduct which renders an applicant for a license ineligible.

c. Eighth Amendment

The Eighth Amendment not only prohibits punishments deemed barbarous and inhumane, but also condemns punishments which by their excessive severity are greatly disproportionate to the "offense" charged.

The question as to whether the proceedings are civil or criminal focuses on the nature of the sanctions imposed.

This Court has distinguished criminal from civil proceedings on the basis of a distinction between "punitive" and "remedial"

statutes. While Courts will not deem a statute criminal if its purpose is to treat, rather than to punish, civil RICO provisions are not an effort to provide **"treatment"** for racketeers in the same way that mentally ill or sexually dangerous persons are. Rather Section 1964 is an effort to find yet another way to punish those who have participated in what the Justice Department deems to be Organized Crime.

Any violation of the Court's Order is punished by criminal contempt as the District Court has assumed absolute plenary powers over all locals and all members throughout the United States. The Order appears to debar Petitioners as consistent with the power of the IBT to expel a member, but the order is much broader. The order also bars them from drawing any money or compensation from any other IBT affiliated source. An affiliated

source is the AFL-CIO.

The sanctions here are punitive in nature and not only involved forfeiture, but a **"blackballing"** of them totally out of the labor field. The assertion that the IBT Constitution disciplinary provisions are merely being invoked as to these Petitioners cannot be seriously argued. These sanctions argue for the proposition that **"state action"** is involved and that the whole proceedings takes aim at an **"identifiable group"** of persons, Italian-American members of the IBT, whose mere association or non-union related acquaintances with members of the Italian-American community in Chicago is sufficient to bring about the aims of the Congress in the enactment of RICO.

Petitioner Talerico was further punished for his persistence upon maintaining his right to remain silent and that is an abusive use of

prosecutive power. It is also contrary to a long list Supreme Court authorities on the subject.

**REASONS FOR GRANTING THE WRIT**

This Court should grant Certiorari in order to determine an important question of law as to whether government can use the Federal Civil Rico Statute to deprive persons in the labor movement throughout the United States, including, but not limited, to other members of the International Brotherhood of Teamsters, the Hotel Employees and Restaurant Employees International, the Laborers International, and the Longshoremen International of a **"liberty interest"** in violation of the First, Fifth and Eighth Amendments to the Constitution.

This Court should also grant Certiorari to determine whether the use of the Federal RICO Statute, which has targeted Italian-

American members of said Unions as members or associates of LCN, without reference to any offense alleged under the RICO Statute, constitutes a Bill of Attainder.

**CONCLUSION**

Petitioners do not contest the salutary aims of the Justice Department in their efforts to rid unionism of criminal element or such persons whose positions in the labor movement have disclosed violations of labor laws which were designed to protect the membership from dishonesty by their representatives. It is, after all, the goal of the Justice Department. But let not such riddance be effectuated by a total disregard for due process. It ought not be under a form of McCarthyism in which to accuse without Constitutional protections is sufficient to deprive such targets of **"liberty interests"**.

WHEREFORE, for the above and foregoing

reasons, Petitioners respectfully pray that this Honorable Court issue its writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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# APPENDIX

APPENDIX A

App. 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1642 -- August Term, 1990

(Argued June 7, 1991 Decided Aug -6 1991)

Docket No. 91-6052

United States of America,
Plaintiff-Appellee,

v.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, The Commission of La Cosa Nostra; Anthony Salerno, also known as Fat Tony; Matthew Ianniello, also known as Matty the Horse; Anthony Provenzano, also known as Tony Pro; Nunzio Provenzano, also known as Nunzi Pro; Anthony Carollo, also known as Tony Ducks; Salvatore Santoro, also known as Tom Mix; Christopher Furnari, Sr., also known as Christie Tick; Frank Manzo; Carmine Persico also known as Junior, also known as the Snake; Gennaro Langella, also known as Gerry Lang; Philip Rastelli, also known as Rusty; Nicholas Marangello, also known as Nicky Glasses; Joseph Massino, also known as Joey Massina; Anthony Ficarotta, also known as Figgy; Eugene Boffa, Sr.; Francis Sheeran; Milton Rockman, also known as Maishe; John Tronolone, also known as Peanuts; Joseph John Aiuppa, also known as Joey O'Brien, also known as Joe Doves, also known as Joey Aiuppa, John Phillip Cerone, also known as Jackie the Lackie, also known as Jackie Cerone; Joseph Lombardo, also

known as Joey the Clown; Angelo LaPietra, also known as the Nutcracker; Frank Balistrieri, also known as Mr. B; Carl Angelo DeLuna, also known as Toughy; Carl Civella, also known as Corky; Anthony Thomas Civella, also known as Tony Ripe; General Executive Board, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Jackie Presser, General President; Weldon Mathis, General Secretary-Treasurer; Joseph Trerotola, also known as Joe T; Robert Holmes, Sr.., Second Vice President; William J. McCarthy, Third Vice President; Joseph W. Morgan, Fourth Vice President; Edward M. Larson, Fifth Vice President; Arnold Weinmeister, Sixth Vice President, John H. Cleveland, Seventh Vice President; Maurice R. Schurr, Eighth Vice President; Donald Peters, Ninth Vice President; Walter J. Shea, Tenth Vice President; Harold Friedman, Eleventh Vice President; Jack D. Cox, Twelfth Vice President; Don L. West, Thirteenth Vice President; Michael J. Riley, Fourteenth Vice President; Theodore Cozza, Fifteenth Vice President; Daniel Ligurotis, Sixteenth Vice President; Salvatore Provenzano, also known as Sammy Pro, Former Vice President,

Defendants,

DOMINIC SENESE AND JOSEPH TALERICO,

Respondents-Appellants.

Charles M. Carberry,
Investigations-Officer-Appellee.

Before OAKES, Chief Judge, PRATT and ALTIMARI, Circuit Judges.

Appeal from orders of the United States District Court for the Southern District of New York, David N. Edelstein, Judge, upholding internal union disciplinary sanctions imposed upon appellants.

Affirmed.

Patrick J. Calihan, Chicago, IL, (Edward J. Calihan, Jr., John Toomey, of counsel), for Respondents-Appellants.

Peter C. Sprung, New York, NY (Otto G. Obermaier, United States Attorney for the Southern District of New York, Edward T. Ferguson, III, of counsel), for Plaintiff-Appellee United States of America.

Charles M. Carberry, New York, NY, Investigations Officer-Appellee. Pro se.

OAKES, Chief Judge:

Dominic Senese and Joseph Talerico, former members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO ("IBT") and former officials of IBT-affiliated local unions, appeal from orders of the United States District Court for the Southern District of New York, David N. Edelstein, Judge, upholding internal union disciplinary sanctions imposed on them by reason of, among other things, their association with organized crime. For the reasons set forth below, we affirm.

BACKGROUND

On March 14, 1989, Judge Edelstein entered a consent decree (the "Decree") settling civil racketeering charges brought by the Government against the IBT and members of the IBT General Executive Board. The Decree

has already engendered a staggering amount of litigation, and, as a result, we have had many occasions to discuss in detail the nature of the underlying racketeering charges and the contents of the Decree itself. See, e.g., United States v. International Broth. of Teamsters, 931 F.2d 177 (2d Cir. 1991). In our discussion here, therefore, we provide only a brief background of the facts giving rise to this particular appeal.

A central feature of the Decree was the establishment of three Court-appointed offices which were designed to oversee the IBT's internal affairs. First, the Decree provided for an Independent Administrator (the "IA"), to oversee the Decree's remedial provisions. Second, it provided for an Investigations Officer, to bring charges against corrupt IBT members. Finally, it established an Elections Officer, to oversee the electoral process

leading up to and including the election for International Officers at the 1991 IBT Convention.

In separate charges filed on November 30, 1989, the Investigations Officer charged Senese and Talerico with violating the IBT Constitution "by conducting [themselves] in a manner to bring reproach upon the [IBT]."[1] At that time, Senese was the President of IBT Local 703 in Chicago, and Talerico was a business agent for Chicago IBT Local 727. The basis for the allegations against Senese was his association with La Cosa Nostra and his knowing association with La Cosa Nostra

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[1]Article II, section 2(a) of the IBT Constitution requires every IBT member to affirm that he will, inter alia, "conduct himself . . . at all times in such a manner as not to bring reproach upon the Union." Article XIX, section 6(b)(2) of the IBT Constitution provides that "[v]iolation of oath of office or of the oath of loyalty to the Local Union and the International Union" is a basis for union disciplinary charges.

members Joseph Aiuppa and John Cerone. The charges against Talerico were premised upon his unlawful refusal to answer questions before a federal grant jury investigating the skimming of money from a Las Vegas casino, and his knowing association with La Cosa Nostra members Joseph Aiuppa and Philip Ponto.[2]

The IA held a hearing on the charges against Senese and Talerico on March 22 and 23, 1990. In support of the charges, the Investigations Officer relied principally on the oral testimony and written declaration of Peter J. Wacks, a Special Agent of the Federal Bureau of Investigation ("FBI"), as well as the declaration of FBI Special Agent Charlie J. Parsons. The Wacks and Parsons

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[2]The Investigations Officer also charged Chicago IBT Local 786 employee James Vincent Cozzo with conducting himself in a manner to bring reproach upon the IBT. Cozzo did not appear at the hearing, however, and the Investigations Officer therefore proceeded against him in his absence.

declarations summarized voluminous evidence concerning Senese and Talerico and their involvement with the Chicago La Cosa Nostra family, and contained extensive supporting documentation.

On July 12, 1990, after reviewing the hearing record and post-hearing memoranda submitted by counsel, the IA issued a 42-page opinion concluding that there was just cause to sustain each of the charges against Senese and Talerico. As a sanction, the IA permanently removed Senese and Talerico from all of their IBT positions, expelled them from the IBT, and prohibited them from drawing any money from the IBT or its affiliates.[3]

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[3]The Independent Administrator also concluded that there was just cause to sustain the charge against Cozzo and imposed the same sanction on him. Cozzo did not appeal to the district court, however, and his case is therefore not before us.

On July 12, 1990, the IA submitted his opinion to the district court, seeking review of his decision on the disciplinary charges against Senese and Talerico. On August 27, 1990, the district court issued an opinion and order upholding the IA's permanent bar of Senese and Talerico, but remanding the case for the IA to determine the proper treatment of Senese's health and welfare benefits.[4] See 745 F.Supp. 908. On remand, the IA issued a supplemental opinion terminating Senese's IBT-related employees benefits. On December 29, 1990, the district court affirmed this supplemental opinion in all respects. See 753 F. Supp. 1181.

Senese and Talerico now appeal from the district court's August 27 and December 29, 1990 orders.

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[4]Talerico represented to the Independent Administrator that he had no continuing IBT-related employee benefit coverage.

DISCUSSION

Senese and Talerico argue that the IA's imposition of sanctions violated their First, Fifth, and Eighth Amendment rights under the United States Constitution. In addition, Senese argues that the termination of his IBT-related benefits violated both the terms of the Decree and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sec. 1001, et seq. (1988). We reject Senese and Talerico's constitutional challenges on two grounds. First, we believe that the IA's imposition of sanctions did not constitute "state action," and that, as a result, the constitutional provisions that Senese and Talerico cite do not apply. Second, even assuming that the IA's conduct did constitute state action, we believe that his decision comported with all the constitutional provisions that might conceivably apply.

Accordingly, because we also believe that the IA's termination of Senese's employee benefit plans was proper, we affirm.

A. Constitutional Claims

1. State Action

Because the United States Constitution regulates only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes "state action." See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1002 (1982). To qualify as state action, the conduct in question "must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and "the party charged with the [conduct] must be a person who may fairly be said to be a state actor." Lugar v. Edmondson

Oil Co., 457 U.S. 922, 937 (1982). The IA's imposition of sanctions on Senese and Talerico meets neither of these criteria.

First, in sanctioning Senese and Talerico, the IA acted pursuant to the IBT Constitution -- a private agreement -- and not pursuant to a "right or privilege created by the State." Id. Thus, the charges he brought were premised on violations of Article II, section 2(a) of the IBT Constitution, not on violations of any federal or state law. Similarly, the IA's authority to impose the sanctions stemmed from the post-Decree amendments to the IBT Constitution, which established the IA and empowered him to oversee the IBT's internal disciplinary affairs, see United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL-CIO, 905 F.2d 610, 622 (2d Cir. 1990), and not from any provision of

federal or state law. Thus, Senese and Talerico fail to satisfy the first element of the definition of state action set forth above.[5]

Senese and Talerico are also unable to establish that the IA "may fairly be said to be a state actor." Lugar, 457 U.S. at 937. The IA has offices that are provided by the IBT, and the IBT pays his salary. Thus, the position is under the control of the IBT, and remains a private, not governmental, role.

In attempting to convince us that the IA is a governmental actor, Senese and Talerico

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[5]Edmondson v. Leesville Concrete Co., Inc., 111 S.Ct. 2077 (1991), where the Court held that a private party exercising peremptory challenges in a civil case to exclude jurors on account of race was a state actor because of legislative establishment of, and judicial supervision over, the jury system and juror selection process, id. at 2084-85, is inapposite. There the Court was dealing with private actors performing governmental functions while here we have the IA, a quasi governmental actor, performing private functions under the IBT Constitution.

emphasize that the IA was established to settle a lawsuit brought by the Government, and that the district court appointed the IA and continues to oversee his affairs. This argument misses the point. The question is not whether the decision to establish the IA was state action, but rather whether the IA's decision to sanction Senese and Talerico may be "fairly attributable" to the Government. Id.; see also Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968) (Friendly, J.) ("[T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury.") (emphasis added). Because the IA's decision to sanction Senese and Talerico was guided only by the IBT Constitution, and not by any state or federal authority, Senese and Talerico's characterization of the IA's decision-as state

action must fail.

Our conclusion that the IA's imposition of sanctions did not constitute state action comports with the Supreme Court's decision in Blum v. Yaretsky, 457 U.S. 991 (1982), and Rendell-Baker v. Kohn, 457 U.S. 830 (1982). In Yaretsky, for example, the Court concluded that a private nursing home's decision to transfer and discharge patients to lower cost facilities was not state action, despite the fact that State regulations "encouraged" the homes to transfer patients to "lower levels of care," because the ultimate decision to transfer was based on "medical judgments made by private parties according to professional standards that are not established by the State." 457 U.S. at 1008 & n.19. Likewise, in Rendell-Baker, the Court found that a private school's decision to fire one of its teachers was not state action, even though the school

was extensively financed and regulated by the State, because the ultimate decision to discharge the teacher was not "compelled or even influenced by state regulation." Rendell-Baker, 457 U.S. at 841. These cases, we believe, indicate that governmental oversight of a private institution does not convert the institution's decisions into those of the State, as long as the decision in question is based on the institution's independent assessment of its own policies and needs. See Albert v. Carovano, 851 F.2d 561, 570-71 (2d Cir. 1988) (en banc) (holding that private university's decision to discipline students was not attributable to the State, even though State required university to establish disciplinary policy, where decision to discipline particular students was based on university's independent assessment of its own needs). Thus, because the IA's decision to

sanction Senese and Talerico was based on the policies and procedures embodied in the IBT's own Constitution, and not on state or federal law, the decision was not state action, and Senese and Talerico's constitutional claims must fail.

2. Substantive Constitutional Rights

Even if the IA's conduct did constitute state action, our result today would be the same, as Senese and Talerico's constitutional claims are entirely without merit.

a. First Amendment

Senese and Talerico argue that the disciplinary sanctions imposed on them violated their First Amendment right to freedom of association, because the sanctions were based in part on their voluntary associations with members of La Cosa Nostra. However, it is well established that an individual's right to freedom of association

may be curtailed to further significant governmental interests. See e.g., United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 567 (1973) (upholding ban on political activity by union employees). Because the public has a compelling interest in eliminating the "'public evils' of 'crime, corruption, and racketeering'" in union activity, Brown v. Hotel & Restaurant Employees and Bartenders Int'l Union Local 54, 468 U.S. 491, 508 (1984) (citation ommitted), the IA was fully justified in sanctioning Senese and Talerico for their knowing association with organized crime here. Accord Hotel & Restaurant Employees Local 54 v. Read, 597 F. Supp. 1431, 1446-51 (D.N.J. 1984) (rejecting claim that New Jersey Casino Control Commission's order requiring removal of union officials based upon their organized crime associations

violated First Amendment right to freedom of association), aff'd mem., 772 F.2d 893 (3d Cir. 1985).

b. Fifth Amendment

Senese and Talerico also claim that the IA's imposition of sanctions violated their Fifth Amendment right to due process. First, they claim that they were denied due process because they were disciplined under procedures contained in a consent decree to which they were not parties. Our prior opinion in United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL-CIO, 931 f.2D 177 (2d Cir. 1991), however, clearly establishes that the IBT leadership adequately represented the interests of the IBT membership in negotiating and adopting the Decree. See id. at 184-87. As such, the fact that Senese and Talerico were not signatories to the Decree is no bar to binding them to the

Decree's terms.

Senese and Talerico also claim that they were denied due process because, until the Decree was adopted, it was not clear that association with members of organized crime was prohibited. This argument is meritless. As Judge Edelstein noted, the Decree did not create new standards of conduct for IBT members, but simply made explicit the longstanding goal of the IBT to be free of corruption. See 745 F. Supp. at 913. As such, the IA's sanctioning of Senese and Talerico for their pre-Decree associations with organized crime did not violate due process.

In addition, Senese and Talerico contend that they were denied their right to confront and cross-examine the witnesses against them. This claim rests principally on the fact that much of the evidence introduced at their

hearing was in the form of hearsay. However, procedural due process does not require rigid adherence to technical evidentiary rules in administrative hearings, as long as the evidence introduced is reliable. See, e.g., Richardson v. Perales, 402 U.S. 389, 402 (1971) (upholding introduction in administrative hearing of hearsay medical reports, based on reports' reliability). Thus, because Senese and Talerico do not dispute that the admitted evidence was reliable, their reliance on the Due Process Clause must fail.

Finally, Senese and Talerico claim that the offense for which they were sanctioned -- bringing "reproach" upon the union -- was unconstitutionally vague. However, even if a regulation may be vague in certain hypothetical applications, it may still constitutionally be applied to conduct that

unquestionably falls within its terms. See Parker v. Levy, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."); See also Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n.7 (1982). Thus, because it should have been clear to Senese and Talerico that associating with known members of organized crime would bring reproach upon the IBT, sanctioning them for these activities was not constitutionally infirm.

c. Eighth Amendment

Senese and Talerico also claim that the sanctions imposed on them constitute "cruel and unusual punishment" in violation of the Eighth Amendment. This claim is entirely without merit. The Eighth Amendment applies only to punitive sanctions, see Browning-

Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989) (noting that the Eighth Amendment has been understood "to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments"), not to the sort of remedial sanctions imposed on Senese and Talerico here. In any event, given that neither death nor incarceration was imposed, Senese and Talerico's reliance on the Eighth Amendment is unfounded.

B. Senese's Benefits

Senese also argues that the IA's decision to prevent him from taking a lucrative severance package from IBT Local 703, and to prevent the Local from making any further contributions on Senese's behalf to any IBT-affiliated benefit plan, violated both the Decree and ERISA. We disagree.

Senese's claim that the termination of his Union and health and welfare benefits

violated the terms of the Decree is groundless. Cutting off Senese's benefits served the Decree's objective of severing ties between the IBT and organized crime. As for Paragraph 20, which Senese contends precludes the IA from terminating his benefits, that provision, by its terms, applies only to the Government, and not to court-appointed officers such as the IA. Paragraph 20 also clearly states that it applies only to the union defendants in the underlying civil RICO action, and not to individuals such as Senese.

Senese's argument that the termination of his benefits violated ERISA is simply unfounded. The anti-alienation provision of ERISA, on which Senese relies, applies only to ERISA pension benefits, not to ERISA welfare benefits. See Mackey v. Lanier Collections Agency & Serv. Inc., 486 U.S. 825, 836 (1988). Because the district court correctly

characterized the benefits here as health and welfare benefits -- a characterization Senese does not challenge -- ERISA does not apply.

Accordingly, the orders of the district court are affirmed.

## APPENDIX B

App. 26

Pertinent portions of the IBT Constitution, Art. II, Sec. 2(a) and Sec. 3(a) read in part: (See underlined portion)

> "Section 2(a). Any person shall be eligible to membership in this organization upon compliance with the requirements of this Constitution and the rulings of the General Executive board. Each person upon becoming a member thereby pledges his honor: to faithfully, observe the Constitution and laws of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the Bylaws and laws of his Local Union; to comply with all rules and regulations for the government of the International Union and his Local Union; to faithfully perform all the duties assigned to him to the best of his ability and skill; <u>to conduct himself or herself at all times in such a manner as not to bring reproach upon the Union;</u> to take an affirmative part in the business and activities of the Union and accept and discharge his responsibilities during any authorized strike or lockout; that he will not divulge to nonmembers the private business of the Union unless authorized to reveal the same; to never knowingly harm a fellow member; to never discriminate against a fellow worker on account of race, color, religion, sex, age, or national origin; to refrain from any conduct that would interfere with the Union's performance of its legal or

contractual obligations; and at all times to bear true and faithful allegiance to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and his Local Union." (emphasis supplied)

* * *

"Section 3(a). No person who actively advocates the overthrow of a federal, state or provincial government by force or violence, or is a member of any party or group and knows of and actively advocates its purpose to overthrow a federal, state of provincial government by force or violence, shall be allowed to hold membership in the International Union or any of its subordinate bodies. If any such person obtains Union membership, or after having been admitted to Union membership advocates the overthrow of a federal, state or provincial government by force or violence, or becomes a member of a party or group and knows of and actively advocates its purpose to overthrow a federal, state or provincial government by force or violence, he shall be expelled from membership upon the filing of charges and the conduct of a trial in accordance with the applicable procedures set forth in Article XIX."

Also pertinent is Art. III, Sec. 9(b) which reads as follows:

"(b) Amendments to the Constitution and all other action of the Convention

shall be adopted by a majority vote of the delegates present, seated and voting at the time of submission of the amendment or other proposed action to the Convention. Amendments shall become effective immediately upon their adoption unless otherwise specified in any particular amendment adopted by the Convention."

## APPENDIX C

App. 29

Pertinent portions of the testimony of FBI Agent Peter Wacks reads as follows: (Tr. 53-54)

* * *

"Q of your -- No, I am sorry. Let me back up. At page 9 of your affidavit I note that in (n) 'Philip Ponto was a member of the Chicago Outfit.' Do you see that in there?

"A Yes, sir.

"Q How do you know that?

* * *

"A It was a question that was posed to Mr. Fratianno by another Agent, Emmet Michaels, who was assigned to the Las Vegas office at the time. And Mr. Fratianno identified Mr. Ponto as a member of the La Cosa Nostra family.

"Q Didn't you tell me that all these surveillances and so forth were sent to the central office?

"A Well, what typically happens to qualify an individual as a LCN member is I am as an investigator in that particular office once you accumulate identifications either by another LCN member or by any other type of criteria that is set up by headquarters you put a package together, send it back to our headquarters in Washington and they make the determination as to include him as a member.

"Q Then the determination as to whether or not someone is a member is made by your office in Washington?

"A In headquarters. They establish the criteria and we --

* * *

"A -- we focus our investigations to try and satisfy that criteria.

## APPENDIX D

**App. 31**

Rule 11, F.R.of Cr.P., reads in pertinent part:

"(6) **Inadmissibility of Pleas, Plea Discussions, and Related Statements.** Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

* * *

"(B) a plea of nolo contendere;

APPENDIX E

App. 32

Pertinent portions of the Petition for Certiorari in United States v. IBT, 90-1904 filed on June 24, 1991, in the Questions Presented and at pp. 31-32 of said Petition are as follows:

"1. Did the Court of appeals err when it affirmed the District Court Order which effectively grants the Government control of the IBT in perpetuity?

"a. Did the court of appeals err when it affirmed the District Court Order which declared that paragraph L.17 of the Consent Decree, which requires Government approval of changes to the IBT Constitution, is a permanent amendment to the IBT Constitution regardless of the vote of the delegates at the Convention.

"b. Did the court of appeals err when it affirmed the District Court Order making all other amendments contained in the Consent Decree permanent amendments to the IBT Constitution.

"c. Did the court of appeals err when it affirmed the injunction issued by the district court, the effect of which is to require the delegates to the Convention to vote on the amendments contained in the Consent Decree while at the same time declaring that vote meaningless."

* * *

"The parties intend the provisions set forth herein to govern future IBT practices in those areas. To the extent the IBT wishes to make any changes, constitutional or otherwise, in those provisions, the IBT shall give prior written notice to the . . . [Government], through the undersigned. If the . . . [Government] then objects to the proposed changes as inconsistent with the terms and objectives of this . . . [Consent Decree], the change shall not occur; provided, however, that the IBT shall then have the right to seek a determination from the Court, or after the entry of judgment dismissing this action, from this Court or any other federal court of competent jurisdiction as to whether the proposed change is consistent with the terms and objectives set forth herein."

* * *

" - the express provisions of the Consent Decree require a vote (A. 63-64, 78-83, and 97);

" - the delegates to the Convention were elected pursuant to procedures implemented and supervised by the Elections Officer (A.66-97);

" - the Consent Decree explicitly recognizes the membership's Landrum-Griffin free speech rights (A. 63-64; see also, U.S.Const., Amend I, 29 U.S.C. Sec. 411(a)(1) and (2));

" - Article III, Section 9(b) of the IBT Constitution requires that 'Amendments to the Constitution . . . shall be adopted by a majority vote of the delegates . . ." (IBT Constitution, p.20); and

" - paragraph 9(b) of the Consent Decree preserves the Government's right to seek 'any appropriate action' if the IBT has not formally amended its Constitution to conform to the terms of the Consent Decree by the completion of the 1991 Convention" (A. 63-64)

* * *

On May 6, 1991, the district court convened a hearing for the purpose of informing the parties that it had issued an opinion on the Government's motion. From the bench the court stated:

> "'I have determined that as a result of decisions in the past two years, it has been settled that the IBT had the power to bind the entire union to the [C]onsent [D]ecree's changes in the IBT Constitution without a vote of the delegates to a convention. Therefore, the vote of the delegates on the [C]onsent [D]ecree to be taken at the 1991 convention will now have no legal effect.

"(A. 111-112.) The Court then issued a written Opinion & Order to that effect. (A.7-54.)"

(2)

NO. 91-717

THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1991 TERM

DOMINIC SENESE AND JOSEPH TALERICO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT**

**SUPPLEMENTAL APPENDIX**

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## SUPPLEMENTAL APPENDIX

**SUP.APP. 1**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>-v-<br><br>INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, OF AMERICA, AFL-CIO, et al.<br><br>Defendants. | OPINION & ORDER<br><br>88 CIV. 4486 (DNE) |

IN RE: APPLICATION XII BY THE INDEPENDENT ADMINISTRATOR

APPEARANCES: CHARLES M. CARBERRY, Investigations Officer, New York, New York (Robert W. Gaffey, of counsel);

OTTO G. OBERMAIER, United States Attorney for the Southern District of New York, Edward T. Ferguson, III, Assistant United States Attorney, for the United States of America;

STILLMAN, FRIDMAN & SHAW, New York, New York (Edward M. Shaw; Patrick J. Calihan, Edward J. Calihan, Chicago, Illinois, Arnold & Kadjan, Chicago, Illinois, of counsel) for Dominic Senese, and Joseph Talerico.

EDELSTEIN, District Judge:

This opinion arises out of the voluntary settlement in the action commenced by the plaintiffs United States of America (the "Government") against the defendants International Brotherhood of Teamsters (the "IBT") and the IBT's General Executive Board (the "GEB") embodied in the voluntary consent order entered March 14, 1989 (the "Consent Decree"). The remedial provisions in the Consent Decree provided for three Court-appointed officials, an Independent Administrator to oversee the remedial provisions, an Investigations Officer to bring charges against corrupt IBT members, and an Election Officer to oversee the electoral

process leading up to and including the 1991 election for International Officers (collectively, the "Court Officers"). The goal of the Consent Decree is to rid the IBT of the hideous influence of organized crime through the election and prosecution provisions.

Application XII presents for this Court's review the July 12, 1990 Opinion of the Independent Administrator. The Independent Administrator held disciplinary hearings on charges filed by the Investigations Officer against three IBT officers, Dominic Senese, Joseph Talerico, and James Cozzo. The Independent Administrator concluded that the Investigations Officer had sustained his burden of establishing just cause for finding that the charges against Senese, Talerico, and Cozzo had been proved. The Independent Administrator imposed lifetime suspensions

from the IBT on Senese, Talerico, and Cozzo. This Application followed.

I. Background

Senese is the president of IBT Local 703, located in Chicago, Illinois. Senese was charged with violating Article II, Sec. 2(a) of the IBT constitution ("Article II, Sec. 2(a)") by conducting himself in a manner that brought reproach upon the IBT.

Talerico is a business agent of Local 727, located in Chicago, Illinois. Talerico was charged with violating Article II, Sec. 2(a) and Article XIX, Sec. 6(b) of the IBT constitution ("Article XIX, Sec. 6(b)") by being adjudged in criminal contempt in violation of 18 U.S.C. Sec. 401(3), and civil contempt for refusing to answer questions before a federal grand jury investigating the skimming of funds from a Las Vegas casino, while an officer of the IBT; and (2) knowingly

associating from January 1, 1981 to the present, with Joseph Aiuppa and Philip Ponto, members of La Cosa Nostra, while an officer of the IBT.

Cozzo was executive coordinator of Local 786 in Chicago Illinois, but has not been employed by that local since July 9, 1989. Cozzo has also taken a withdrawal card and is not a member of that local. Cozzo was charged with violating Article II, Sec. 2(a) and Article XIX, Sec. 6(b) by being a member of La Cosa Nostra, while employed by Local 786.

Article II, Sec. 2(a) is the IBT membership oath. That section provides in relevant part that every IBT member shall "conduct himself or herself in such a manner as not to bring reproach upon the Union..." Article XIX, Sec. 6(b) provides the bases for bringing disciplinary charges against IBT members. Article XIX, Sec. 6(b)(1) indicates

that violating any specific provision of the IBT constitution is chargeable conduct. Article XIX, Sec. 6(b)(2) states that transgressing the IBT oath of office is chargeable conduct.

II. Discussion

With respect to the disciplinary and investigatory provisions of the Consent Decree, the IBT General President and GEB delegated their disciplinary authority under the IBT constitution to the Court Officers. United States v. International Brotherhood of Teamsters, (2d Cir., slip Opinion June 1, 1990 at 30-32); see also November 2, 1989 Memorandum and Order, 725 F.Supp. 162, 169 S.D.N.Y.); January 17, 1990 Memorandum and Order, 728 F.Supp. 1032, 1048-57 (S.D.N.Y.), aff'd (2d Cir., slip opinion, June 27, 1990); Local 295 v. Lacey et al., July 20, 1990 at 3-4 (S.D.N.Y.); Joint Council 73 et al. v.

Carberry et al., July 23, 1990 at 4-5 (S.D.N.Y. 1990). The Independent Administrator and Investigations Officer are stand-ins for the General President and GEB for the purpose of the instant disciplinary actions. Hearings before the Independent Administrator are conducted pursuant to the same standards applicable to labor arbitration hearings. Consent Decree, Sec. F.12.(A)(ii)(e).

Paragraph F.12(C) of the Consent Decree mandates that the Independent Administrator must decide disciplinary hearings using a "just cause" standard. Consent Decree at 9. Paragraph K.16 provides that this Court shall review actions of the Independent Administrator using the "same standard of review applicable to review of final federal agency action under the Administrative Procedures Act." Consent Decree at 25. This

Court may only overturn the findings of the Independent Administrator when it finds that they are, on the basis of all the evidence, "arbitrary or capricious." This Court and the Court of Appeals have interpreted Sec. K.16 to mean that decisions of the Independent Administrator "are entitled to great deference." 2d Cir., Slip Opinion, June 1, 1990 at 15, see also March 13, 1990 Opinion and Order, 735 F.Supp. 506, 511 (S.D.N.Y.1990).

Cozzo failed to respond to the charges filed by the Investigations Officer, did not appear for his disciplinary hearing, and does not challenge the decision of the Independent Administrator to this Court. Senese and Talerico argue that Independent Administrator's determination that the charges were sustained against them was "arbitrary and capricious." For reasons to be discussed, the

Independent Administrator's conclusions in the July 12, 1990 Opinion must be upheld in all respects.

A. Facial Challenges to the Discipline Hearings

Senese and Talerico facially challenge several aspects of the procedure followed by the Court Officers to conduct their hearing. At the outset, Senese and Talerico contest the jurisdiction of the Independent Administrator to hear the charges against them. Senese and Talerico assert they were deprived of their rights under the united States Constitution. Senese and Talerico further argue that the Independent Administrator erred in allow the introduction of, and then relying upon hearsay evidence.

1. Jurisdictional Challenge

Senese and Talerico first argue that the Independent Administrator has no jurisdiction

to discipline them, since they were neither parties to the underlying litigation nor signatories to the Consent Decree. This argument is utterly without merit. It is beyond doubt that the disciplinary and investigatory provisions of the Consent Decree are binding on non-signatory members of the IBT. See United States v. International Brotherhood of Teamsters, (2d Cir., slip opinion June 1, 1990 at 30-32); see also November 2, 1989 Memorandum and Order, 725 F.Supp. 162, 169 (S.D.N.Y.1989); jANUARY 17, 1990 Memorandum and Order, 728 F. Supp. 1032, 1048-57 (S.D.N.Y.1990), aff'd (2d Cir., slip opinion, June 27, 1990); Local 295 v. Lacey et al., July 20, 1990 at 3-4 (S.D.N.Y. 1990); Joint Council 73 et al. v. Carberry et al., July 23, 1990 at 4-6 (S.D.N.Y. 1990).

2. Constitution Challenges

Senese and Talerico contend that the

charges against them are violative of their rights under the First and Fifth Amendments to the United States Constitution. Senese and Talerico do not demonstrate that any Constitutional protection attaches to the conduct or their charges. As a result, the Independent Administrator's determination that these charges do not infringe Senese and Talerico's Constitutional rights must be upheld.

Senese and Talerico argue that these charges sanction them for associating with certain individuals, in violation of their First Amendment right of freedom of association. Senese and Talerico essentially ask this Court to rule that the IBT cannot punish members whose activities are adverse to the union's stated goal to be free of corruption, because they have a First Amendment right to associate with whomever

they please.

Union members' First Amendment rights are statutorily curtailed by Sec. 101(a)(2) of the Labor-Management Reporting and Disclosure Act, ("LMRDA"), 29 U.S.C. Sec. 411(a)(2). Section 101(a)(2) specifically preserves for labor unions the right to "enforce reasonable rules as to the responsibility of every member toward the organization as an institution," and to sanction its members for conduct "that would interfere with its performance of its legal or contractual obligations." 29 U.S.C. Sec.411(a)(2).

It is the stated policy of the IBT to be free of the influence of organized crime. Consent Decree, fifth and sixth "WHEREAS" clauses. Union officers' associations with organized crime members pose a danger to the integrity of the IBT as an institution. United States v. Local 560, International

Brotherhood of Teamsters, 560 F.Supp. 279, 315 (D.N.J. 1984). It is beyond dispute that the IBT can sanction its own members who knowingly associate with organized crime figures, since such conduct violates "the responsibility of every member toward the institution" of Sec. 101(a)(2) of the LMRDA.

The Independent Administrator noted that governments may lawfully impair an individual's freedom of association in a number of contexts. See e.g., Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125-133 (1977) (Prison management outweighs prisoners' associative rights); Cordero v. Coughlin, 607 F. Supp. 9, 911 (S.D.N.Y. 1984) (segregating AIDS prisoners); United States Civil Serv. Com'n v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548, 567 (1973) (ban on political activity by federal employees); United States

v. Boyle, 338 F. Supp. 1028, 1032-33 (D.C. Colo. 1972) (ban on union political contributions). A state may strictly regulate which persons may serve in positions as officials in unions involved in gaming casinos. In Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54, 468 U.S. 491, 509 (1984), the Supreme Court held that the public has a compelling interest in eliminating the "'public evils' of 'crime, corruption, and racketeering'" to justify such regulation on association. Id. While this situation involves sanctions imposed by a private actor, the IBT, the cited cases are further support for the Independent Administrator's conclusions.

The common denominator in all these cases is that the compelling state interest outweighs the associational infringement. If a state has a compelling interest in keeping

private entities free of the influence of organized crime, then a private actor such as the IBT, which has a broad and universal impact on the commerce of the United States, surely has a compelling interest in ridding itself of the influence of organized crime. The Independent Administrator determined that the IBT has the right to discipline members for knowingly associating with organized crime figures since it has a compelling institutional interest in ridding itself of corruption. The IBT's sanctioning members in order to rid itself of corrupt influence conforms with Sec. 101(a)(2) of the LMRDA, and infringes on First Amendment rights. See Turner v. Air Transport Lodge 1948, 590 F.2d 409, 412 (2d Cir. 1978) (Mulligan J. concurring), cert. denied, 442 U.S. 919 (1979).

Accordingly, the ruling of the

Independent Administrator that these charges do not violate Senese and Talerico's First Amendment rights is not arbitrary or capricious, and must be upheld.

Senese and Talerico argue that current punishment for their past conduct violates their Fifth Amendment due process rights. They contend that at the time of the prohibited conduct they were not on notice that associating with certain individuals would subject them to union discipline. Senese and Talerico reason that prior to the signing of the Consent Decree, the IBT did not explicitly prohibit associating with organized crime figures. Senese and Talerico essentially argue that it is a due process violation for a labor union to step up its disciplinary enforcement after a period of laxity.

The factors relied upon by the

Independent Administrator were sufficient to determine that these charges curtail no Fifth Amendment due process rights. First, the Consent Decree created no new standards of conduct for IBT members. Rather, the Consent Decree simply made explicit the longstanding goal of the IBT to be free of corruption. For example, it has been the written policy of the AFL-CIO -- with whom the IBT is affiliated -- to be free of all corrupt influence. Second, an IBT officer plainly should know that associating with organized crime figures would violate his oath of office to not bring reproach upon the union. Indeed, this Court has held that "it defies logic to determine that [associating with organized crime figures] would not 'bring reproach upon the union'" March 13, 1990 Order, supra, 735 F. Supp. at 516, aff'd (2d Cir., slip opinion,

June 1, 1990).[1]

Senese and Talerico were charged with breaching their sworn oaths not to bring reproach upon the IBT. By knowingly associating with organized crime figures, Senese and Talerico ignored their avowed duties as IBT officers to remain free of corrupt influence. The Independent Administrator found that Talerico and Senese as IBT officers knew or should have known that such conduct was a violation of their oath of office. It is true that the permanent injunction against associating with organized crime figures located Sec. E.10 of the Consent

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[1]Additionally, the Independent Administrator noted that the Supreme Court has held that contemporary licensing schemes may take into account past behavior without denying an individual due process. See De Veau v. Braisted, 363 U.S. 144, 160 (1960). It is true that the De Veau decision and the resulting line of cases consider current enactments of public legislatures which take into account past activity, and are thus distinguishable from the disciplinary actions of a private actor such as the IBT. But this body of law does indicate that even under the more exacting standards applied to public laws, under proper circumstances current licensing schemes may consider and sanction past behavior.

Decree prospectively prohibits such associations. Yet, it in no way bars the imposition of sanctions for past conduct.

In sum, there is more than ample support for the finding that the charges against Senese and Talerico do not violate their due process rights under the Fifth Amendment. Thus, the findings of the Independent Administrator must be upheld.

3. Procedural Defects

Senese and Talerico next argue that the Investigations Officer further denied them due process of law under the Consent Decree by failing to provide them with all the evidence to be used against them 30 days in advance of their hearing, as they feel is required by Sec. F.12.(A)(ii)(b). In this regard, Senese and Talerico contend that the "Investigations Officer had no intention of allowing a fair hearing." (Senese Br., at 15).

But Senese and Talerico did not petition the Independent Administrator for the pre-hearing production of all evidence. Rather, they sought a bill of particulars and the issuance of subpoenas, requests that were rejected by the Independent Administrator. Senese and Talerico cannot point to an identifiable determination of the Independent Administrator to appeal now to this Court.

Further, the transcript of the hearing indicates that the Independent Administrator offered Senese and Talerico a seven-to-ten-day adjournment to study further the evidence produced, and decide if they wanted to recall Special Agent Wacks. (Hearing transcript, at 183-93) This offer alone eliminated any possible prejudice to Senese and Talerico.

4. Admission of Evidence

Senese and Talerico vigorously contest the Independent Administrator's decision to

allow the introduction of hearsay evidence at the disciplinary hearing. Senese and Talerico also argue that the Independent Administrator incorrectly determined that the hearsay evidence was reliable.

These arguments misconstrue the nature of the disciplinary hearings themselves, and the determinations of the Independent Administrator. Paragraph F.12.(A)(ii)(e) of the Consent Decree stipulates that the Independent Administrator shall conduct disciplinary hearings "under the rules and procedures generally applicable to labor arbitration hearings." Consent Decree at 9. The Independent Administrator correctly determined that at a labor arbitration hearing, hearsay evidence is admissible if reliable. 6 Kneel, Labor Law Sec. 24.04[3][f]; see Elkouri and Elkouri, How Arbitration Works 325-27 (1985). The proper

inquiry by the Independent Administrator was to examine the reliability of the hearsay evidence. This Court's review is limited to assessing whether that determination of reliability by the Independent Administrator was arbitrary or capricious.

The primary evidence at the hearing against Senese was the testimony and affidavit of FBI Special Agent Wacks and the affidavit of FBI Special Agent Parsons. Special Agent Wacks averred that the basis for his affidavit and testimony as (a) two FBI reports dated December 11, 1985 and April 10, 1986, compiled from information supplied to the FBI by former IBT General President Jackie Presser (Ex. IO-1A(K), Ex. IO-1A(L); (b) Wacks' notes from his presence at an FBI debriefing of former IBT General President Roy Williams (Wacks aff., Sec. 31, Ex. IO-IA(K)); (c) The deposition testimony of Cleveland La Cosa Nostra

underboss Angelo Lonardo taken during the underlying litigation (Wacks Aff., Sec. 30, EX. IO-1(K); (d) the testimony of an unnamed cooperating witness (Tr., 194-20 to 195-15); and (e) physical surveillance by the FBI (Tr. 157-23 to 158-6, 162-21 to 163-1). The Independent Administrator also admitted Special Agent Wacks as an expert on organized crime by the standards under Fed.R.Ev. 702).

Senese and Talerico argue that the Wacks affidavit and testimony was unreliable hearsay. They point out that two sources, Presser and Williams, are deceased, and unavailable for cross-examination. They offer that Lonardo and the unnamed cooperating witness were available and should have been called to testify at the hearing. Further, they claim the surveillance indicated that Wacks did not personally see Senese or Talerico associate with organized crime

figures. As a result, they argue the hearsay in the Wacks affidavit and testimony renders that evidence not credible. Senese and Talerico do not challenge the Independent Administrator's decision to admit Wacks as an expert, or the reliability of the affidavit of Special Agent Parsons.

In making his determination that the Wacks affidavit and testimony were reliable, the Independent Administrator considered that Wacks' information was culled from multiple sources. Additionally, the various sources corroborated one another. The Independent Administrator cited the fact that Senese was identified as a member of La Cosa Nostra by Presser, Lonardo, and Williams. After hearing Wacks' oral testimony, the Independent Administrator found him to be a knowledgeable and trustworthy witness. Considering his multiple sources, their corroboration, and his

demeanor, the Independent Administrator deemed Wacks a credible witness and his hearsay information reliable.

The Independent Administrator properly applied careful scrutiny to the Wacks affidavit and testimony before making his conclusion of reliability. As the trier of fact, the Independent Administrator was in the best position to judge the credibility and demeanor of Wacks as a witness, and the reliability of the information he offered. Considering the great deference to be given determinations of the Independent Administrator, his finding the information contained in the Wacks affidavit and testimony reliable hearsay was not arbitrary or capricious.

B. The Sufficiency of the Evidence

The Independent Administrator determined that there was just cause to sustain a charge

that Senese violated Article II, Sec. 2(a) by knowingly associating with organized crime figures.

1. The Case Against Senese

Senese asserts the evidence relied on by the Independent Administrator was improper, unreliable, and insufficient to sustain the charges against him. Further, Senese contends that the Independent Administrator ignored his meritorious defenses and competent evidence. The challenges to the evidence now brought to this Court are the exact challenges raised by Senese before the Independent Administrator. The Independent Administrator rejected these challenges since he deemed the Wacks affidavit and testimony to be credible and trustworthy. His conclusion that there was just cause to sustain the charges against Senese on the basis of evidence offered must be affirmed.

The evidence introduced by the

Investigations Officer against Senese was considerable. Lonardo placed Senese with Joey Aiuppa, the boss of the Chicago organized crime family, and Jackie Cerone, that organization's underboss. Presser told the FBI that Senese was a member of the Chicago La Cosa Nostra code named "Big Banana," that Senese was a violent "animal," and that Senese assumed greater responsibility in the Chicago La Cosa Nostra organization when his supervisor Aiuppa went to prison. Williams told the FBI that Senese's local [703] was mob controlled. Senese was the victim of shotgun-blast to the head attempt on his life. The FBI had previously warned Senese that a mob-related attempt on his life was planned. FBI surveillance photographs placed Senese with Jackie Cerone, Jr., son of the incarcerated Jackie Cerone. The cooperating witness observed that Senese met in a restaurant on

many occasions with Angelo LaPietra, who was a street boss in the Chicago La Cosa Nostra. That witness also observed that Senese met in that same restaurant with John DiFronzo, the current underboss of the Chicago La Cosa Nostra. There was also Wacks' conclusion as an expert, that based on the available information, Senese met the FBI's criteria to be considered a member of the Chicago La Cosa Nostra.

Senese challenges as unreliable hearsay the facts supplied to Wacks by Presser and Williams. He further argues that the deposition testimony of Lonardo that placed Senese with Aiuppa and Cerone should be rejected since Lonardo was available to testify at the disciplinary hearing. Senese purportedly challenges this evidence's sufficiency, but in reality questions its admissibility. Senese does not refute the

substance of this evidence. This Court has already affirmed the Independent Administrator's determination that the evidence from Special Agent Wacks was credible. Since Senese may point to no rebuttal evidence, there is no further basis to find that it was arbitrary or capricious for the Independent Administrator to consider and give weight to this evidence.

Senese challenges three conclusions drawn by the Independent Administrator from the evidence. Senese (1) notes that Lonardo could not hear the substance of the conversation between Senese, Aiuppa, and Cerone, (2) questions the basis for the determination by the FBI that the persons he associated with were members of La Cosa Nostra, and (3) asserts that the attempt on his life was not La Cosa Nostra related.

Senese does not point to any facts in the

record to support his assertion that Messrs. Aiuppa, Cerone, Cerone, Jr., DiFronzo, or LaPietra -- the persons that he associated with -- were not members of La Cosa Nostra. The Wacks affidavit and testimony indicate that each of these individuals were members of La Cosa Nostra in supervisory positions. There is no basis to suspect that these conclusions by the FBI are not correct.

Senese also challenges the conclusion by the Independent Administrator that the January 21, 1988 attempt on Senese's life was "mob-related." Special Agent Wacks indicated that the FBI warned Senese that from its own surveillance information, the FBI felt Senese's life may be in danger. Senese suffered a shotgun blast to his head, which he survived. Senese argues that some accounts indicated that the shooting may have been IBT, and not La Cosa Nostra related. The assertion

by Senese that the shooting was related to his union duties is pure fantasy. Considering the evidence before the Independent Administrator, his finding the shooting mob-related was not arbitrary or capricious.

Senese next argues that the Independent Administrator failed to consider Senese's meritorious defenses. Senese claims that Article XIV, Sec. 3(d) of the IBT constitution bars his facing disciplinary charges stemming from conduct which occurred prior to his current term of elective office if the conduct was "known generally" to the membership. This Court and the Court of Appeals have ruled that Article XIX, Sec. 3(d) is only a bar to actions known generally to the membership, not allegations. See November 2, 1989 Order, supra, 725 F.Supp. at 165, aff'd (2d Cir., slip opinion, June 1, 1990); March 13, 1990 Order, supra, 735 F.Supp at 517-18, aff'd (2d

Cir., slip opinion, June 1, 1990; United States v. International Brotherhood of Teamsters, slip opinion, June 1, 1990, supra, at 25-26. Frank Wsol testified for Senese that the membership had reelected Senese despite public allegations of Senese's La Cosa Nostra involvement. The Independent Administrator determined that the membership of Local 703 reelected Senese with knowledge of the allegations against him, not his conduct, making this defense unavailable. That determination was neither arbitrary nor capricious.

Senese further argues that the Independent Administrator ignored the testimony of his character witnesses. Two of these witnesses testified that Senese had obtained benefits for the membership of Local 703. A priest testified to the good character and charitable nature of Senese. The

Independent Administrator discounted the importance of this general character testimony to the charges. As the trier of fact, the Independent Administrator's judgments of the credibility and weight to accord witnesses' testimony must be given great deference. Further, even if given full credence, this character testimony does not refute the evidence offered to the substance of the charges. There is nothing in the record to indicate that the Independent Administrator's decision to give this character testimony little weight was arbitrary or capricious.

As the Independent Administrator carefully determined, the testimony from Special Agent Wacks supported the conclusion that senese knowingly associated with organized crime figures. The evidence before the Independent Administrator supported his finding just cause to sustain the charges

against Senese, and this determination was not arbitrary or capricious.

2. The Evidence Against Talerico

The Independent Administrator determined that there was just cause to sustain two separate charges of violating Article II, Sec. 2(c) and Article XIX, Sec. 6(b) against Talerico. Talerico argues both determinations were arbitrary and capricious.

a. Prior Criminal Conduct

The first charge proved against Talerico was that he brought reproach upon the IBT by being held in civil and criminal contempt for his refusal to testify before a federal grant jury investigating the skimming of funds from a Las Vegas, Nevada casino, after being granted immunity, while he was business agent of Local 727. The Independent Administrator determined that Talerico's refusal to cooperate with the federal investigation,

coupled with the fact that he was held in criminal contempt and spent time in prison, constituted bringing reproach upon the union.

Talerico argues that it was unfair for the Independent Administrator to consider his refusal to testify before the grand jury as proof of his crime of criminal contempt. Talerico states that his criminal conviction for contempt was a plea nolo contendere as proof of the underlying conduct.

The Investigations Officer argued, and the Independent Administrator agreed, that nolo contendere please were admissible in labor arbitration hearings to establish just cause to find the charged party has committed the underlying offense. In re Alpha Beta Co. and United Food and Convenience Workers, Local 770, 91 Lab.Arb. (BNA) 1225 (1988); Great Scot Food Stores, 73 Lab. Arb. (BNA) 147 (1979); The Great Atlantic & Pacific Tea Company, 45

Lab. Arb. (BNA) 495 (1965). The Independent Administrator's determination in this regard was not arbitrary or capricious.

Talerico further argues that the Independent Administrator was arbitrary and capricious in sustaining the charges against him because he was not on notice that exercising his Fifth Amendment privilege could be violative of his IBT oath. The Independent Administrator considered the serious nature of the grand jury investigation, that Talerico had been granted immunity from prosecution, and Talerico's suspicious behavior during the period being investigated by the grant jury. Based on these facts the Independent Administrator determined that there was just cause to conclude that Talerico's refusal to testify brought reproach upon the IBT. The Independent Administrator reasoned that an IBT officer refusing to cooperate with a grand

jury investigating organized crime corruption would bring reproach upon the IBT. I cannot find that this decision was arbitrary or capricious.

b. Knowingly Associating with Organized Crime Figures

The Independent Administrator concluded that just cause existed to find that Talerico had violated Article II, Sec. 2(a) and Article XIX, Sec. 6(b) of the IBT constitution by knowingly associating with Philip Ponto, a member of organized crime, on five instances in 1981, and one in 1982. Talerico admits that he met with Ponto on the occasions identified by the Investigations Officer. However, Talerico challenges the finding of the Independent Administrator that Talerico knew that Philip Ponto was a member of La Cosa Nostra during 1981 and 1982.

The Independent Administrator relied on

the affidavit of Special Agent Charlie J. Parsons, the FBI Organized Crime Supervisor for the Las Vegas Division. Special Agent Parsons supervised the investigation into the Las Vegas casino skimming scheme by the Chicago La Cosa Nostra. Special Agent Parsons indicated that Ponto was a member of the Chicago La Cosa Nostra at the time of the meetings in question. (Ex. IO-2, Sec. 12). Special Agent Parsons averred that he personally observed Talerico meet with Ponto in Las Vegas, and the Las Vegas area. (Ex. IO-2, Sec. 8).

Talerico argues that his contact with Ponto did not constitute "knowing association" with an organized crime figure, since he claims that in 1981 and 1982 he was unaware that Ponto was affiliated with organized crime. Talerico offered no evidence to rebut Agent Parsons' conclusion that Ponto was a

member of La Cosa Nostra. The record supports the Independent Administrator's finding that Ponto was a member of La Cosa Nostra at the time of his six confirmed meetings with Talerico.

Further, the extent of Talerico's contact with Ponto was sufficient to constitute "knowing association." The Independent Administrator determined that "knowing association" should be inferred from the "duration and quality" of the association. The Independent Administrator considered the evidence before him and concluded that Talerico knew or should have known that Ponto was a member of La Cosa Nostra. The Independent Administrator considered that Talerico's contact with Ponto was purposeful and not fleeting. Accordingly, the Independent Administrator determined that Talerico knowingly associated with Philip

Ponto, a member of La Cosa Nostra.

The record supports the finding of the Independent Administrator. Special Agent Parsons averred that Talerico regularly travelled under assumed names between Chicago and Las Vegas to transport the illegally skimmed monies from Las Vegas to the Chicago organized crime families. It was admitted by Talerico that he met with Parsons on the occasions in question. Talerico has not refuted that Ponto was a member of La Cosa Nostra during the meetings in question. Special Agent Parsons concluded that on the basis of the observed meetings between Ponto and Talerico, and his selection to transport the monies between Chicago and Las Vegas, Talerico was a close associate of the Chicago La Cosa Nostra.

The unrefuted facts relied on by the Independent Administrator in reaching his

determination that Talerico's association with Ponto was knowing, purposeful and not fleeting were sufficient to find the charges had been proved against Talerico. The Independent Administrator considered that Talerico travelled to Las Vegas to meet with Ponto under assumed names, the circumstances surrounding the meetings between Talerico and Ponto, that the meetings took place in rest areas, parking lots and grocery stores, and that the conversations were punctuated with exchanges of packages and envelopes. The Independent Administrator's determination was not arbitrary or capricious.

Talerico's other arguments are unpersuasive. There is no fundamental unfairness from being charged in 1990 for conduct that occurred in 1981 and 1982. Talerico's argument that his association under the charged circumstance with Ponto, an

organized crime figure, cannot "bring reproach" upon the IBT is ludicrous. His assertion that these charges constitute vindictive prosecution by the Government is similarly absurd. That Talerico insists that his travel under assumed names was his "own business" is of no moment in refuting the evidence against him. The Independent Administrator correctly concluded that Talerico knowingly associated with an organized crime figure, namely Philip Ponto. This conclusion was not arbitrary or capricious.

C. Penalties Imposed by the Independent Administrator

1. Severity of the Penalty

The Independent Administrator imposed lifetime suspensions from the IBT on Talerico, Senese and Cozzo. Talerico and Senese argue that the severity of this penalty is out of

proportion to their conduct. They argue that the penalty is not permitted by the LMRDA, 29 U.S.C. Sec. 504. They further assert that the Independent Administrator imposed severe penalties out of animus for Italian-Americans.

That the IBT has historically been tainted by corruption is beyond dispute. A review of the evidence indicates that Cozzo, Talerico and Senese were found to be engaging in the exact conduct that this Consent Decree intends to root out of the IBT. The evidence established that Senese was a member of the Chicago La Cosa Nostra. The evidence established that Talerico met with known organized crime figures under suspicious circumstances and opted to spend a period of time in prison rather than testify before a grand jury investigating corruption. The evidence established that Cozzo was a member

of the Chicago La Cosa Nostra.[2] Such behavior is antithetical to any standard of appropriate conduct for a union officer. Accordingly, the penalty imposed by the Independent Administrator is neither arbitrary nor capricious. Finally, it is well within the power of the Independent Administrator to impose lifetime suspensions, since Sec. 101(a)(5) of the LMRDA contemplates that a union member may be "fined, suspended or expelled" by that union. 29 U.S.C. Sec. 411(a)(5) (emphasis added). As a result, 29 U.S.C. Sec. 504 is inapplicable.

Senese and Talerico argue that this Court should review a lifetime suspension from the IBT with greater scrutiny than other determinations since such a penalty is in

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[2]As noted earlier, Cozzo defaulted by not appearing at his hearing before the Independent Administrator, and failed to appear before this Court.

essence a "death penalty." The Consent Decree does not provide for any greater review of a penalty determination than any other action of the Independent Administrator. But that is no matter, since this Court has and will continue to review every determination of the Independent Administrator with great care and diligence. Given that the goal of the IBT is to be free of the hideous influence of organized crime, the Independent Administrator's decision that a lifetime suspension was the appropriate penalty was not arbitrary or capricious.

Finally, Senese and Talerico posit that the Independent Administrator imposed more severe penalties them than on Friedman and Hughes out of a bias against Italian-Americans. There is not one iota of evidence in the record to support this wild and desperate assertion by Senese and Talerico.

Such irresponsible statements by parties and counsel are unprofessional, and bespeak complete incompetence.

2. The Inclusion of Health, Welfare and Pension Benefits

The Independent Administrator asked this Court to clarify his power to terminate health and welfare benefits of the IBT members as part of any penalty he imposes. The prudent procedure for this Court to consider this question is for the Independent Administrator to first decide the question after full briefing from the parties, and then submit that determination to this Court for review.

III. Conclusion

The decisions of the Independent Administrator with respect to the sufficiency of the charges against Senese, Talerico, and Cozzo are hereby affirmed. The decisions of the Independent Administrator that Senese,

Talerico, and Cozzo should be given lifetime suspensions from the IBT are hereby affirmed. The question of whether the penalties imposed on Senese, Talerico, and Cozzo should include the termination of health and welfare benefits is returned to the Independent Administrator for a determination. The stay on the imposition of the other penalties is hereby dissolved, and they shall be effective immediately.

SO ORDERED.

DATED: NEW YORK, NEW YORK
AUGUST 27, 1990

/s/
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA, Plaintiff, -v- INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, OF AMERICA, AFL-CIO, et al. Defendants. | MEMORANDUM & ORDER 88 CIV. 4486 (DNE) |

IN RE: APPLICATION XVI BY THE INDEPENDENT ADMINISTRATOR

APPEARANCES: CHARLES M. CARBERRY, Investigations Officer, New York, New York (Robert W. Gaffey, of counsel);

OTTO G. OBERMAIER, United States Attorney for the Southern District of New York, Edward T. Ferguson, III, Assistant United States Attorney, for the United States of America;

STILLMAN, FREEMAN & SHAW, New York, New York, Edward M. Shaw, (Arnold & Kadjan, Chicago, Illinois, John J. Toomey, of counsel), for Dominic Senese.

This memorandum emanates from the voluntary settlement in the action commenced by the plaintiffs United States of America (the "Government") against the defendants International Brotherhood of Teamsters (the "IBT") and the IBT's General Executive Board (the "GEB") embodied in the voluntary consent order entered March 14, 1989 (the "Consent Decree"). The remedial provisions in the Consent Decree provided for three Court-appointed officials, the Independent Administrator to oversee the remedial provisions, an Investigations Officer to bring charges against corrupt IBT members, and an Election Officer to oversee the electrical process leading up to and including the 1991 election for International Officers

(collectively, the "Court Officers"). The goal of the Consent Decree is to rid the IBT of the hideous influence of organized crime through the election and prosecution provisions.

I. Background

Application XVI of the Independent Administrator submits for this Court's review his November 29, 1990 supplemental opinion (annexed as exhibit 1) to his opinion of July 12, 1990. The July 12, 1990 opinion of the Independent Administrator decided disciplinary charges against Dominic Senese, Joseph Talerico, and James Cozzo, and was submitted for this court's review by way of Application XII. In the July 12, 1990 opinion, the Independent Administrator found that the Investigations Officer had met his burden and demonstrated just cause that the charges against Senese, Talerico, and Cozzo had been

proved. Application XII was affirmed in all respects by the August 27, 1990 Opinion and Order of this Court, 745 F. Supp. 908 (S.D.N.Y. 1990), except this Court remanded the question of whether the penalties of lifetime suspension from the IBT imposed on Senese, Talerico, and Cozzo included the termination of their health and welfare benefits. The facts and circumstances surrounding the charges against Senese, Talerico, and Cozzo are fully set out in the August 27, 1990 Opinion, supra, familiarity with which is assumed.

The supplemental opinion only considered the termination of Senese's health and welfare benefits: Talerico and Cozzo had no known health and welfare benefits. With respect to Senese, the Independent Administrator determined that (1) the Consent Decree is no bar to his terminating health and welfare

benefits; (2) he lacks jurisdiction over Senese's three health and welfare plans; (3) that while he has the power to prevent Senese from receiving any payments from his health and welfare plans he would not order such, and (4) he would bar Senese's former local from making post expulsion payments into the plans for Senese's benefit. Further, the Independent Administrator invalidated certain severance disbursements made by Local 703 to Senese, specifically (i) a sixty (60) week severance allowance; and (ii) transference to Senese of full title of his IBT-owned automobile.

In his objections to the supplemental opinion, Senese argues (i) that the Independent Administrator is barred from terminating health and welfare benefits by the ERISA state-law preemption; (ii) the Consent Decree prevents the termination of these

health and welfare benefits; and (iii) this Court should review this penalty determination Independent Administrator da novo. The Government objects solely to the decision of the Independent Administrator not to prohibit Senese from receiving any payments from his health and welfare plans. The Investigations Officer concurs with the supplemental opinion in all respects.

The supplemental opinion of the Independent Administrator is affirmed in all respects.

II. Discussion

A. The Consent Decree Permits the Termination of Health and Welfare Benefits

Senese argues that the determination of the Independent Administrator that Secs. M. 18 and 0.20 of the Consent Decree do not prevent him from imposing a penalty involving health and welfare benefits was arbitrary and capricious. This contention is twofold.

First, he argues that Sec. M.18--a catchall reservation of rights provision--specifically prevents any termination of health and welfare benefits.[3] Second, Senese argues that Sec. 0.20 limits the penalties that may be imposed by the Independent Administrator.[4] Senese's

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[3]Paragraph M. 18 of the Consent Decree provides as follows: "Except as provided by the terms of this order [the Consent decree] nothing else herein shall be construed or interpreted as affecting or modifying: (a) the IBT Constitution; (b) the Bylaws and Constitution of any IBT affiliates; (c) the conduct and operation of the affairs of the IBT or any IBT-affiliated entity or any employee benefit fund as defined in ERISA or trust fund as defined by Section 302(c) of the Labor Management Relations Act, as amended; (d) the receipt of any compensation or benefits lawfully due or vested to any officer, employee, member or employee of the IBT or any of its affiliates and affiliated benefit fund; or (e) the term of office of any elected or appointed IBT officer or any of the officer of any IBT-affiliated entities.

[4]Paragragh 0.20 states as follows: "Nothing herein shall preclude the United States of America or the United States Department of Labor from taking any appropriate action in regard to any of the union defendants in reliance on federal laws, including an action or motion to require

argument is without merit and must be dismissed.

These arguments to this Court are essentially the same as those rejected by the Independent Administrator. With respect to Sec. M.18, the Independent Administrator correctly noted that the only authority of the Independent Administrator to impose punishment listed at Sec. F.12.(c) controlled the general reservations of rights provision of Sec. M.18. For example, under Senese's proposed interpretation of these provisions, Sec.18(a) would preclude the Independent Administrator from suspending or debarring a sanctioned IBT officer. Such reasoning is illogical and directly contravenes the explicit and implicit

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disgorgement of pension, severance or any other retirement benefits of any any individual union officer defendant on whom discipline is imposed pursuant to paragragh 12 above".

terms of the Consent Decree.

Senese's proposed reading of Sec. 0.20 is similarly mistaken. Paragraph 0.20 specifically applies only to those individuals who were defendants in the underlying RICO action. This provision has no relevance to penalties imposed against Senese.

As a result, Senese has not demonstrated that this determination of the Independent Administrator was arbitrary or capricious.

B. ERISA State Law Pre-Emption

Senese argues that the Independent Administrator has no power to interfere with any aspect of Senese's health and welfare plans because ERISA pre-empts state law. Specifically, Senese contends that the Independent Administrator's disciplinary power derives from the Consent Decree, which is a contract. As a result, Senese argues that an ERISA plan may not in any way be impaired by

authority deriving from state law contractual terms. This argument is without reason.

Unlike ERISA pension benefits, ERISA health and welfare benefits are subject to alienage. Guidry v. Sheet Metal Workers National Pension Fund, 110 S.Ct. 680, 685 (1990); Mackey v. Lanier Collections Agency & Services, Inc., 486 U.S. 825, 835 (1988). As a result, the question of ERISA pre-emption is inapplicable to this issue. Moreover, Senese's attempt to characterize the Consent Decree--entered under the federal RICO statute--as analogous to a state law contract is absurd. As a result, Senese has not demonstrated that this determination of the Independent Administrator was arbitrary or capricious.

C. Standard of Review of the Independent Administrator

Senese argues that this Court review

these determinations of the Independent Administrator de novo because this matter involves questions of ERISA and an interpretation of the Consent Decree. This contention is meaningless and calls upon the Court to ignore the numerous determinations in this case. See United States v. International Brotherhood of Teamsters, 905 F.2d 610, 616 (2d Cir. 1990, aff'd March 13, 1990 Opinion and Order, 743 F.Supp. 155, 159-60 (S.D.N.Y. 1990); November 2, 1989 Memorandum and Order, 725 F. Supp. 162, 169 (S.D.N.Y. 1989); January 17, 1990 Memorandum and Order, 728 F. Supp. 1032, 1048-57 (S.D.N.Y. 1990), aff'd 907 F.2d 277 (2d Cir. 1990); Local 27 v. Carberry, et al., July 20, 1990 at 3-4 (S.D.N.Y. 1990); Joint Council 73 et al. v. Carberry et al., 741 F.Supp. 491, 493 (S.D.N.Y. 1990); August 27, 1990 Opinion and Order, 745 F.Supp. 908, 911, September 18, 1990 Opinion and Order, 745

F. Supp. 189, 191-92.

Paragraph F.12.(C) of the Consent Decree mandates that the Independent Administrator must decide disciplinary hearings using a "just cause" standard. Consent Decree at 9. Paragraph K.16 provides that this Court shall review actions of the Independent Administrator using the "same standard of review applicable to review of final federal agency action under the Administrative Procedures Act." Consent Decree at 25. This Court may only overturn the findings of the Independent Administrator when it finds that they are, on the basis of all the evidence, "arbitrary or capricious." This Court and the Court of Appeals have interpreted Sec. K.16 to mean that decisions of the Independent Administrator "are entitled to great deference." 905 F.2d at 616 (2d Cir. 1990) aff'd March 13, 1990 Opinion and Order, 743 F.

Supp. 155 (S.D.N.Y. 1990).

Senese's argument is without merit and must be dismissed.

D. Further Sanctions

The Government challenges the determination of the Independent Administrator not to prevent Senese from receiving payments that may be made to him from his health and welfare plans because of contributions already made into those plans. In his supplemental opinion, the Independent Administrator deemed it "impractical, and perhaps unworkable, to prohibit Senese from drawing any payment from these plans..." The Government disagrees.

The Independent Administrator determined not to prevent Senese from receiving these payments. Essentially because these health and welfare plans are so intricate and complex, the Independent Administrator decided not to prevent Senese from receiving such

benefits because it would create problems foreseeable and unforeseeable.

Accordingly, this determination was neither arbitrary nor capricious.

III. Conclusion

IT IS HEREBY ORDERED that the supplemental opinion of the Independent Administrator, annexed as exhibit 1, is affirmed in all respects. These penalties shall take effect with the entry of this order.

So Ordered.

Dated: December 18, 1990
New York, New York

/s/
U.S.D.J.

(3)

No. 91-717

# In the Supreme Court of the United States

OCTOBER TERM, 1991

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DOMINIC SENESE AND
JOSEPH TALERICO, PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the decision by union officials, appointed pursuant to a consent decree settling litigation between the union and the United States, to enforce provisions of the union constitution against petitioners is governmental action in violation of the First and Fifth Amendments to the Constitution.

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### OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-25) is reported at 941 F.2d 1292. The district court's opinion entered on August 27, 1990 (Supp. App. 1-47), is reported at 745 F. Supp. 908, and the district court's supplemental opinion entered on December 28, 1990 (Supp. Pet. App. 48-61), is reported at 753 F. Supp. 1181.

### JURISDICTION

The court of appeals' order was entered on August 6, 1991. The petition for a writ of certiorari was filed on October 30, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

## STATEMENT

1. In June 1988, the United States filed a civil action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*, against the International Brotherhood of Teamsters (IBT) and members of the IBT General Executive Board. Pet. App. 4. The complaint alleged that the IBT had long been under the control of organized crime, and sought equitable relief to rid the union of such control. See *United States* v. *IBT*, 905 F.2d 610, 612-613 (2d Cir. 1990). In March 1989, the parties agreed to settle the action and stipulated to the entry of a consent decree incorporating the terms of their settlement agreement. Pet. App. 4-5; C.A. App. A135-A165 (text of consent decree).

The principal goal of the settlement and consent decree is to wrest the union from the influence of organized crime and establish a new system of rank-and-file elections of IBT officers. Supp. App. 3; Consent Decree 2; *United States* v. *IBT*, 931 F.2d 177, 180-181 (2d Cir.); *United States* v. *IBT*, 764 F. Supp. 787, 788 (S.D.N.Y. 1991), aff'd mem., 940 F.2d 648 (2d Cir.), cert. denied, 112 S. Ct. 76 (1991). As provided by the consent decree, the district court appointed three officers from a list of names jointly submitted by the parties: an Independent Administrator, an Investigations Officer and an Elections Officer. Pet. App. 5. These officers exercise powers delegated to them by union officials under the terms of the settlement. The Independent Administrator oversees the activities of the other two officers and the union's internal disciplinary affairs. Pet. App. 5, 12. The Investigations Officer investigates and prosecutes disciplinary charges against IBT members for violations of the union constitution. The Election Officer is

responsible for oversight and certification of the 1991 election process. Pet. App. 5-6. The IBT pays the salaries of the court-appointed officers and provides their office space. Pet. App. 13. The authority of the three officers, with certain limited exceptions, will expire in 1992, after certification of the results of the recent election for union officers. Consent Decree 3.

Under the decree, a party facing a disciplinary charge brought by the Investigations Officer has the right to notice and a hearing before the Independent Administrator. Consent Decree 9. The hearings are conducted in the same manner as labor arbitration proceedings. Supp. App. 7. The Administrator's decision is then subject to review by the district court. Consent Decree 10. The decree states that in reviewing such decisions, the district court shall apply the same standard of review a federal court applies to administrative decisions under the Administrative Procedure Act. *Id.* at 25.

The consent decree enjoins any union member from knowingly associating with "any member or associate of the Colombo Organized Crime Family of La Cosa Nostra, the Genovese Organized Crime Family of La Cosa Nostra, the Gambino Organized Crime Family of La Cosa Nostra, the Lucchese Organized Crime Family of La Cosa Nostra, the Bonnano Organized Crime Family of La Cosa Nostra, [and] any other Organized Crime Families of La Cosa Nostra or any other criminal group." Consent Decree 6. The consent decree specifically provides that "[t]he IBT Constitution shall be deemed and hereby is amended to incorporate and conform with all of the terms set forth in this order." Consent Decree 5.

2. The Investigations Officer filed disciplinary charges against petitioners for violation of Article II,

§ 2(a) of the IBT Constitution, which has long required every member to conduct himself in a manner which will not "bring reproach upon the union." Pet. App. 6 & n.1. The charges were based, in part, upon petitioners' knowing association with the members of La Cosa Nostra. Charges against petitioner Talerico were also based upon his unlawful refusal to answer questions before a federal grand jury investigating "skimming" from a Las Vegas casino. Talerico served time in prison for civil and criminal contempt resulting from his refusal to testify. Pet. 6-11; Supp. Pet. App. 34-35.

Petitioners sought a hearing before the Independent Administrator (IA). The IA held a hearing, and after review of the record and memoranda submitted by counsel, issued a 42-page opinion sustaining the charges against petitioners. Pet. App. 7-8. He found that petitioners' knowing contacts with organized crime figures were "purposeful and not incidental or fleeting." C.A. App. A1201. As to Talerico, the IA relied in particular on evidence that Talerico had traveled on a number of occasions under an assumed name to meet an organized crime figure and exchange packages or envelopes with him. C.A. App. A1205. In addition, the IA emphasized that Talerico's "refusal to testify was especially iniquitous" because Talerico had previously been granted immunity. C.A. App. A1196. As to Senese, the IA found, based on a review of the extensive evidence (C.A. App. A1188-A1190), that Senese "was and is a member of La Cosa Nostra and that Senese has knowingly associated with members of La Cosa Nostra." C.A. App. A1192. As a sanction for violation of the IBT Constitution, the IA expelled petitioners from the IBT and prohibited them from drawing any funds from the IBT or its affiliates. Pet. App. 8.

3. The IA's decision was submitted to the district court for review. The district court determined that the sanction was both supported by the evidence and consistent with the IBT Constitution. Supp. App. 28-47. The district court also rejected petitioners' contentions that the sanction violated their First Amendment freedom of association rights and their Fifth Amendment due process rights. Citing the fact that the union's stated policy, embodied in the consent decree, was to be free of organized crime influence (Supp. App. 12), the court held that a union can sanction its members for knowingly violating such a policy. The court also found that the consent decree "created no new standards of conduct for IBT members," but rather put into effect a long-standing policy of both the IBT and of the AFL-CIO, with which the IBT is affiliated, "to be free of all corrupt influence." Supp. App. 17. Any past laxness in enforcing that policy did not deprive petitioners of fair notice that associating with organized crime figures violated union standards of conduct. Supp. App. 18.

4. The United States Court of Appeals for the Second Circuit affirmed. The court rejected petitioners' constitutional challenges on two independent grounds. First, the court held that the disciplinary actions of the court-appointed officials did not constitute governmental action subject to constitutional constraints. Pet. App. 11-17. The court found that the actions of the Investigations Officer and the IA were based upon the IBT Constitution, not any state or federal authority, and therefore did not constitute governmental action under this Court's precedents. *Ibid.*

Second, the court of appeals held that, even if the administration of internal union disciplinary proceed-

ings could be characterized as governmental conduct, petitioners had not alleged any actions in violation of the First Amendment or the Due Process Clause. Pet. App. 17. The court held that petitioners' First Amendment right to associate with known members of organized crime did not outweigh the need of both the union and the public to eliminate the influence of organized crime on labor unions. Pet. 17-19. The Court further found that the claim that it violated due process to punish petitioners for their pre-decree association with organized crime was "meritless." Pet. App. 20. The court of appeals agreed with the district court's conclusion that the decree "simply made explicit the longstanding goal of the IBT to be free of corruption," *ibid.*, and observed that the petitioners did not dispute the fact that the evidence that formed the basis for the disciplinary sanctions was reliable. Pet. App. 21.

## ARGUMENT

1. The court of appeals' fact-specific conclusion that the IA's enforcement of provisions of the IBT constitution against petitioners was not governmental action is fully supported by this Court's precedents and is not in conflict with the decision of any other court of appeals. Further review is unwarranted.

The United States Constitution's protections of individual liberties and due process apply only to action by the government. *E.g.*, *Edmonson* v. *Leesville Concrete Co.*, 111 S. Ct. 2077, 2082 (1991). There is no "state action" to trigger the application of these constitutional rights unless there has been a misuse of power "possessed by virtue of state [or federal] law and made possible only because the wrongdoer is clothed with the authority of state [or federal] law."

*West* v. *Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941)). Moreover, the party charged with deprivation of a constitutional right "must be a person who may fairly be said to be a state actor." *West* v. *Atkins*, 487 U.S. at 49 (quoting *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

The present case involves neither the use of governmental authority nor the action of governmental actors. The sanctions at issue here were imposed in the course of an internal union disciplinary proceeding arising out of petitioners' violations of the union's constitution. Petitioners were not charged with violations of any provision of federal law. Pet. App. 6-8. The procedures used to sanction petitioners were specified by the union constitution as modified by the terms of the union's settlement reflected in the consent decree. See Consent Decree 5. The court of appals correctly determined that internal union disciplinary proceedings cannot be characterized as state action under this Court's precedents. See, *e.g.*, *Blum* v. *Yaretsky*, 457 U.S. 991 (1982); *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922 (1982); *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982).

Nor is the IA a state actor. He was selected pursuant to the terms of a settlement agreement between the union and the United States and is not an employee of the United States. He is paid by the union and works in office space provided by the union. Pet. App. 13. And he exercises powers delegated by union officials and conferred by the union constitution, as modified by the consent decree. See *United States* v. *IBT*, 905 F.2d at 622.[1]

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[1] Petitioners attempt to cast doubt on whether the consent decree was binding on them and whether it was properly made

Petitioners' reliance upon this Court's recent decision in *Edmonson* v. *Leesville Concrete Co.*, *supra*, is misplaced. Pet. 12-13. In *Edmonson*, this Court held that peremptory challenges exercised by a private party in a civil case amounted to state action because the jury selection process involves the "performance of a traditional function of government," the resultant jury is a "quintessential governmental body," and the power to challenge a juror could not exist "absent ~~[of]~~ overt, significant assistance" from the government. 111 S. Ct. at 2084-2085. The Court analogized the exercise of peremptory challenges by attorneys for the parties to the delegation to a private party of the authority to choose a government employee or official. *Id.* at 2085.

In stark contrast to *Edmonson*, the union disciplinary proceedings at issue in this case do not involve any governmental function, the exercise of any governmental powers, or the delegation of any governmental authority. Nor does the fact that the disciplinary charge at bar was brought by an official selected pursuant to a consent decree alter that conclusion. Petitioners were charged, tried, and sanctioned in accordance with procedures that the IBT voluntarily and effectively made part of the IBT con-

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part of the IBT constitution. Pet. 15-16, 18-21. Those issues have already been fully litigated. The district court resolved that the clear terms of the decree amended the IBT constitution to incorporate the terms of the decree. *United States* v. *IBT*, 764 F. Supp. 787 (S.D.N.Y. 1991). The Second Circuit affirmed, and this Court denied certiorari. 112 S. Ct. 76 (1991). Further, the Second Circuit has repeatedly held that the decree, and the resultant amendments to the IBT Constitution, are binding upon the union membership and officers. See *United States* v. *IBT*, 931 F.2d at 184-187; *United States* v. *IBT*, 905 F.2d at 622-623.

stitution. The federal government is no more responsible for the application of those procedures than it is for the subsequent conduct of any litigant who has been sued by the federal government and agreed to reform its practices to settle the lawsuit. Incidental federal involvement in matters pertaining to the officers appointed under the consent decree, such as the availability of district court review of disciplinary decisions, does not transform the IA's discretionary exercise of power under the union constitution into governmental action. See, *e.g.*, *Polk County* v. *Dodson*, 454 U.S. 312 (1981); *Powe* v. *Miles*, 407 F.2d 73, 81 (2d Cir. 1968) ("the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury").

2. The court was also correct in its alternative holding rejecting the constitutional claims asserted by petitioners.

a. Petitioners argue that expelling them from the union because of their ties to organized crime violated their First Amendment right to freedom of association. Pet. 17-19. Petitioners do not dispute the IA's factual findings regarding the nature of their association with organized crime: Senese "was and is a member of La Cosa Nostra" and Talerico traveled under an assumed name to meet an organized crime figure to exchange packages or envelopes on a number of occasions. C.A. App. A1192, A1205. Petitioners were union officers and, as the court of appeals recognized, the union and the public at large have a strong interest in enforcing codes of conduct designed to wrest the IBT from the control of organized crime. That interest more than outweighs petitioners' purported "right" to exercise power as union officials

while engaging in extensive association with known members of organized crime. Pet. App. 17-18.

b. The courts below were also correct in rejecting petitioners' contention that the sanction violated their Fifth Amendment due process rights. Petitioners, who were represented by counsel throughout the disciplinary proceeding, were provided with notice of the charges against them and four months to prepare for the hearing on those charges. U.S. C.A. Br. 32. They were also supplied with copies of the written testimony and exhibits that the Investigations Officer intended to use at the hearing. *Ibid.* After the hearing, the IA issued a thorough decision explaining why petitioners' conduct violated the IBT constitution. Pet. App. 7-8; Supp. App. 19-25. The district court found that the hearings were conducted in the same manner as labor arbitration proceedings, that the decision was supported by sufficient evidence, and that the sanction was authorized by the union constitution. Supp. App. 7, 28-46. The conclusion of both courts that the procedures used in petitioners' hearing comported with due process standards was correct and would not in any event warrant further review.

Petitioners argue that it was unfair to expel them for their past associations with organized crime. Pet. 24-25. However, as the courts below explained, the consent decree merely "made explicit the longstanding goal of the IBT to be free of corruption." Pet. App. 20; see also Supp. App. 13-18. Petitioners, as union officials, had ample notice that those associations could, in the terms of the IBT constitution, "bring reproach upon the Union." Pet. App. 6 n.1. Past laxness in enforcing the union policy could not disable the union from instituting more thorough enforcement when its enforcement machinery was invigorated by the consent decree.

3. Petitioners do not assert that the decision of the court of appeals conflicts with any ruling of any other court of appeals. Moreover, the issues presented by petitioners are unique to the temporary arrangement established by the 1989 consent decree between the IBT and the United States. Under the terms of the decree, the authority of the court-appointed officers, with certain limited exceptions, will expire this year, after the 1991 union election results are certified. Consent Decree 3. This case thus presents no issue of continuing importance warranting further review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

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(4)

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF OF RESPONDENT CHARLES M. CARBERRY IN OPPOSITION

---

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## QUESTION PRESENTED

Whether the decision by union officials, appointed pursuant to a consent decree settling litigation between the union and the United States, to enforce provisions of the union constitution against petitioners is governmental action in violation of the First, Fifth and Eighth Amendments to the Constitution.

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## STATEMENT

1. In June 1988, the United States filed a civil action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, against the International Brotherhood of Teamsters (IBT) and members of the IBT General Executive Board. (Pet. App. 4.) The complaint alleged that the IBT had long been under the control of organized crime, and sought equitable relief to rid the union of such control. *See United States v. International Bhd. of Teamsters*, 905 F.2d 610, 612-613 (2d Cir. 1990). In March 1989, the parties agreed to settle the action and stipulated to the entry of a consent decree incorporating the terms of their settlement agreement. (Pet. App. 4-5); (C.A. App. A135-A165); (text of consent decree).

The principal goal of the settlement and consent decree is to wrest the union from the influence of organized crime and establish a new system of rank-and-file elections of IBT officers. (Pet. Supp. App. 3); (Consent Decree 2); *United States v. International Bhd. of Teamsters*, 931 F.2d 177, 180-81 (2nd Cir. 1991); *United States v. International Bhd. of Teamsters*, 764 F. Supp. 787, 788 (S.D.N.Y. 1991), *aff'd mem.*, 940 F.2d 648 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 76 (1991). As provided by the consent decree, the district court appointed three officers from a list of names jointly submitted by the parties: an Independent Administrator, an Investigations Officer and an Elections Officer. (Pet. App. 5). These officers exercise powers delegated to them by union officials under the terms of the settlement. The Independent Administrator oversees the activities of the other two officers and the union's internal disciplinary affairs. (Pet. App. 5, 12). The Investigations Officer investigates and prosecutes disciplinary charges against IBT members for violations of the union constitution. The Elections Officer is responsible for oversight and certification of the 1991 election process. (Pet.

App. 5-6). The IBT pays the salaries of the court-appointed officers. (Pet. App. 13). The authority of the Independent Administrator and Investigations Officer, with certain limited exceptions, will expire in 1992, nine months after certification of the results of the recent election for union officers. (Consent Decree 3).

Under the decree, a party facing a disciplinary charge brought by the Investigations Officer has the right to notice and a hearing before the Independent Administrator. (Consent Decree 9). The hearings are conducted in the same manner as labor arbitration proceedings. (Pet. Supp. App. 7). The administrator's decision is then subject to review by the district court. (Consent Decree 10). The decree states that in reviewing such decisions, the district court shall apply the same standard of review a federal court applies to administrative decisions under the Administrative Procedure Act. *Id.* at 25.

The consent decree enjoins any union member from knowingly associating with "any member or associate of the Colombo Organized Crime Family of La Cosa Nostra, the Genovese Organized Crime Family of La Cosa Nostra, the Gambino Organized Crime Family of La Cosa Nostra, the Lucchese Organized Crime Family of La Cosa Nostra, the Bonnano Organized Crime Family of La Cosa Nostra, [and] any other Organized Crime Families of La Cosa Nostra or any other criminal group." (Consent Decree 6). The consent decree specifically provides that "[t]he IBT Constitution shall be deemed and hereby is amended to incorporate and conform with all of the terms set forth in this order." (Consent Decree 5).

2. The Investigations Officer filed disciplinary charges against petitioners for violation of Article II, § 2(a) of the IBT Constitution, which has long required every member to conduct himself in a manner which will not "bring reproach upon the union." (Pet. App. 6 & n.1). The charges were based, in part, upon petitioners' knowing

association with the members of La Cosa Nostra. Charges against petitioner Talerico were also based upon his unlawful refusal to answer questions before a federal grand jury investigating "skimming" from a Las Vegas casino. Talerico served time in prison for civil and criminal contempt resulting from his refusal to testify. (Pet. App. 6-11); (Pet. Supp. App. 34-35).

Petitioners sought a hearing before the Independent Administrator (IA). The IA held a hearing, and after review of the record and memoranda submitted by counsel, issued a 42-page opinion sustaining the charges against petitioners. (Pet. App. 7-8). He found that petitioners' knowing contacts with organized crime figures were "purposeful and not incidental or fleeting." (C.A. App. A1201). As to Talerico, the IA relied in particular on evidence that Talerico had traveled on a number of occasions under an assumed name to meet an organized crime figure and exchange packages or envelopes with him. (C.A. App. A1205). In addition, the IA emphasized that Talerico's "refusal to testify was especially iniquitous" because Talerico had previously been granted immunity. (C.A. App. A1196). As to Senese, the IA found, based on a review of the extensive evidence (C.A. App. A1188-A1190), that Senese "was and is a member of La Cosa Nostra and that Senese has knowingly associated with members of La Cosa Nostra." (C.A. App. A1192). As a sanction for violation of the IBT Constitution, the IA expelled petitioners from the IBT and prohibited them from drawing any funds from the IBT or its affiliates. (Pet. App. 8).

3. The IA's decision was submitted to the district court for review. The district court determined that the sanction was both supported by the evidence and consistent with the IBT Constitution. (Pet. Supp. App. 25-47). The district court also rejected petitioners' contentions that the sanction violated their First Amendment freedom of association rights and their Fifth Amendment due process

rights. Citing the fact that the union's stated policy, embodied in the consent decree, was to be free of organized crime influence (Pet. Supp. App. 12), the court held that a union can sanction its members for knowingly violating such a policy. The court also found that the consent decree "created no new standards of conduct for IBT members," but rather put into effect a longstanding policy of both the IBT and of the AFL-CIO, with which the IBT is affiliated, "to be free of all corrupt influence." (Pet. Supp. App. 17). Any past laxness in enforcing that policy did not deprive petitioners of fair notice that associating with organized crime figures violated union standards of conduct. (Pet. Supp. App. 18).

4. The United States Court of Appeals for the Second Circuit affirmed. The court rejected petitioners' constitutional challenges on two independent grounds. First, the court held that the disciplinary actions of the court-appointed officials did not constitute governmental action subject to constitutional constraints. (Pet. App. 11-17). The court found that the actions of the Investigations Officer and the IA were based upon the IBT Constitution, not any state or federal authority, and therefore did not constitute governmental action under this Court's precedents. *Ibid.*

Second, the court of appeals held that, even if the administration of internal union disciplinary proceedings could be characterized as governmental conduct, petitioners had not alleged any constitutional violations. (Pet. App. 17). The court held that petitioners' First Amendment right to associate with known members of organized crime did not outweigh the need of both the union and the public to eliminate the influence of organized crime on labor unions. (Pet. App. 17-19). The court further found that the claim that it violated due process to punish petitioners for their pre-decree association with organized crime was "meritless." (Pet. App. 20). The court of appeals agreed with the district court's conclusion that the

decree "simply made explicit the longstanding goal of the IBT to be free of corruption," *ibid.*, and observed that the petitioners did not dispute the fact that the evidence that formed the basis for the disciplinary sanctions was reliable. (Pet. App. 21).

## REASONS FOR DENYING THE WRIT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Because the issues presented by petitioners are fact specific and the authority of the IA and Investigations Officer will expire this year, this case presents no issue of continuing importance warranting further review by the Court.

### I. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *EDMONSON v. LEESVILLE CONCRETE CO., INC.*, 111 S.Ct. 2077 (1991)

Each of the constitutional provisions invoked by petitioners requires action by the government. *E.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). To qualify as state action, the deprivation at issue must first have "resulted from the exercise of a right or privilege having its source in state [or federal] authority." *Edmonson v. Leesville Concrete Co., Inc.*, 111 S.Ct. 2077, 2082-83 (1991). Second, the party charged with deprivation of a constitutional right "must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). The Second Circuit properly concluded that neither of these criteria was satisfied by the IA's imposition of sanctions on petitioners.

First, the sanctions on petitioners did not result from the exercise of a right or privilege having its source in governmental authority. Petitioners were charged with violations of the union's constitution, not with violations of any state or federal law. (Pet. App. 6-8). Similarly,

the IA's authority to impose the sanctions stemmed from the Post-Decree amendments to the IBT Constitution, which established the IA and empowered him to oversee the IBT's internal disciplinary affairs, *see United Staies v. International Bhd. of Teamsters*, 905 F.2d 610, 622-23 (2d Cir. 1990), and not from any provision of state or federal law. Accordingly, the court of appeals correctly recognized that these internal union disciplinary proceedings cannot constitute governmental actions under this Court's precedents. *E.g., Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

Second, the IA is not a "state actor" but a private actor substituting for IBT officials who ordinarily would exercise disciplinary authority. Although appointed by the district court, the IA is not an officer of the government but an independent officer paid by the IBT. As the Second Circuit previously recognized, he acts in place of the IBT General President and General Executive Board ("GEB") for purposes of conducting disciplinary proceedings and imposing disciplinary sanctions. *United States v. International Bhd. of Teamsters*, 905 F.2d at 618, 623 ("the IBT merely exercised its discretionary authority under the [IBT] Constitution to delegate the investigation and discipline of union misconduct to court-appointed officers"); *accord United States v. International Bhd. of Teamsters*, 745 F. Supp. 189, 191 (S.D.N.Y. 1990) ("The Independent Administrator and Investigations Officer are stand-ins for the General President and GEB for the purpose of the instant disciplinary actions."). That the Administrator was appointed by the district court does not transform him into a state actor for constitutional purposes. *Cf. Polk County v. Dodson*, 454 U.S. 312, 319 (1981) (state-paid public defender was not acting as a state agent when she declined to prosecute the defendant's appeal, because she was acting on the defendant's behalf as a defense lawyer, "a private function, traditionally filled

by retained counsel, for which state office and authority are not needed"). Nor does the district court's authority to review the IA's determinations—an authority that would exist in any event [1]—alter the fact that the determination of union disciplinary proceedings is a purely private function undertaken by the Administrator as a private actor pursuant to a relationship entered into between private parties—the IBT and its officials. *Cf. Blum v. Yaretsky*, 457 U.S. 991, 1008 & n.19 (1982) (private nursing home's decision to transfer and discharge patients to lower cost facilities was not state action, despite the fact that state regulations "encouraged" the home to transfer patients to "lower levels of care," because the ultimate decision to transfer was based on "medical judgments by private parties according to professional standards that are not established by the State."); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 356-59 (1974) (termination of service by a private utility did not constitute state action and, therefore, was not subject to constitutional review, notwithstanding that the utility was licensed and regulated by the government).

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[1] Wholly apart from the consent decree, the district court would have authority to review union disciplinary determinations under Section 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 412. The scope of review of such internal disciplinary proceedings is strictly limited to a determination of whether the charged party received the full and fair hearing required by the LMRDA and whether there was merely "some evidence" to support the charge. *E.g., International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 244-47 (1971), *reh'g denied*, 402 U.S. 967 (1971); *Vars v. International Bhd. of Boilermakers*, 320 F.2d 576 (2d Cir. 1963); *see* 29 U.S.C. § 411(a)(5)(A). Similarly, internal interpretations of union constitutions are not subject to close scrutiny by the courts. *Felton v. Ullman*, 629 F. Supp. 251, 255 (S.D.N.Y. 1986). Here, the IBT has fully delegated its internal authority to interpret its constitution to the Independent Administrator. *United States v. International Bhd. of Teamsters*, 905 F.2d 610, 618-19 (2d Cir. 1990).

In support of the petition, petitioners have cited no case that conflicts with the court of appeals' decision. They merely dispute that court's conclusion that *Edmonson v. Leesville Concrete Co., Inc.*, 111 S.Ct. 2077 (1991), is "inapposite." (Pet. 12). In *Edmonson*, this Court held that peremptory challenges exercised by a private party in a civil case amounted to state action because the jury selection process involves the "performance of a traditional function of government," the resultant jury is a "quintessential governmental body," and the power to challenge a juror could not exist "absent overt, significant assistance" from the government. 111 S.Ct. at 2084-85. By contrast, the union disciplinary proceedings at issue in this case do not involve any governmental function, the exercise of any governmental powers, or the delegation of any governmental authority. Because the IA's determinations involve no more "state action" than would precisely the same determinations by the IBT General Executive Board for whom he substitutes, the court of appeals correctly distinguished this case from this Court's recent decision in *Edmonson*.

## II. THE COURT OF APPEALS' ALTERNATIVE HOLDING REJECTING PETITIONERS' CONSTITUTIONAL CLAIMS WAS ALSO CORRECT

A. Petitioners argue that expelling them from the union because of their ties to organized crime violated their First Amendment right to freedom of association. (Pet. 17-19). Petitioners do not dispute the IA's factual findings regarding the nature of their association with organized crime: Senese "was and is a member of La Cosa Nostra" and Talerico traveled under an assumed name to meet an organized crime figure to exchange packages or envelopes on a number of occasions. (C.A. App. A1192, A1205). As this Court has noted, the union and the public at large have a compelling interest in eliminating the " 'public evils' of 'crime, corruption, and

racketeering' " in union activity, *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54*, 468 U.S. 491, 508 (1984) (citation omitted), that more than outweighs petitioners' purported "right" to exercise power as union officials while engaging in extensive association with known members of organized crime.

B. The courts below were also correct in rejecting petitioners' contention that the sanction violated their Fifth Amendment due process rights. Petitioners' constitutional challenge to the admission of hearsay evidence should be swiftly rejected. It is well settled that outside the context of criminal trials, reliable hearsay is admissible; procedural due process does not require adherence to strict evidentiary standards. *E.g., Richardson v. Perales*, 402 U.S. 389 (1971) (procedural due process was not violated by the government's introduction of medical reports as reliable hearsay at administrative hearing on a claimant's eligibility for disability benefits). In this case, the hearsay evidence was admitted only after petitioners, who were represented by counsel, had been provided notice of the charges against them and copies of the written testimony and exhibits that the Investigations Officer intended to use against them. Accordingly, petitioners have suggested no basis for questioning the court of appeals' decision, much less a reason for reconsidering settled precedent in this Court.

Petitioners have also argued that they were denied fair notice that associating with members or organized crime would "bring reproach upon the union" and, thus, that their conduct contravenes the disciplinary provisions of the IBT constitution. The traditional constitutional test for vagueness is whether the challenged regulations "are set out in terms that the ordinary person exercising common sense can sufficiently understand and comply with. . . ." *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973). Even

if the regulations may be "vague in some hypothetical peripheral application," they will withstand challenge when applied to conduct that would ordinarily be understood to come within their reach. *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988), *cert. denied*, 488 U.S. 982 (1988). In this case, the charged and proven conduct—membership in and association with organized crime—was clearly contrary to the proscription against conduct "bring[ing] reproach upon the union," however uncertain the reach of that proscription may be at the margins.[2] The lower court decisions denying petitioners' vagueness claim were therefore clearly correct.

C. Petitioners' final constitutional argument—that the sanctions imposed by the IA violate the Eighth Amendment's prohibition against "cruel and unusual punish-

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[2] Petitioners also argue that because they were not signatories to the consent decree, it was an unconstitutional interference with their "contract" with the IBT to subject them to charges initiated by the Investigations Officer and adjudicated by the IA. In rejecting precisely the same argument raised by other disciplined IBT officials, the Second Circuit concluded that those officials, like petitioners, were bound by the decree:

> because the investigating and disciplinary powers of the court-appointed officers are proper delegations of the powers of the IBT General President and the GEB [General Executive Board] within the scope of the IBT Constitution that binds all members of the IBT, and because the IBT Constitution, in Article XXVI, section 2, contemplates amendment by the GEB, under the circumstances of this case, as a result of judicial direction.
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> * * * *
>
> In this case, [the official] was subject to disciplinary oversight both before and after the entry of the Consent Decree, and the IBT merely exercised its discretionary authority under the [IBT] Constitution to delegate the investigation and discipline of union misconduct to court-appointed officers.

*United States v. International Bhd. of Teamsters*, 905 F.2d 610, 622-23 (2d Cir. 1990).

ment"—is frivolous. The sanctions do not constitute "punishment," as they were imposed by a private party following his resolution of disciplinary charges to which the government was not a party. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (Eighth Amendment inapplicable to civil suits between private parties). Even if the union disciplinary proceeding had not been a purely private dispute, but had been initiated by the government, the sanctions imposed in this case would not be "so punitive as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'" *United States v. Ward*, 448 U.S. 242, 249 (1980) (quoting *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956)). Finally, even if they could somehow be construed as "punishment" for constitutional purposes, the sanctions imposed in this case would not be so disproportionately harsh as to constitute punishment that is "cruel and unusual" under the Eighth Amendment. Petitioners cite no cases in which sanctions less harsh than death or incarceration have been adjudged to be constitutionally excessive, and even "*successful* challenges to the proportionality of particular [prison] sentences [will be] exceedingly rare." *Solem v. Helm*, 463 U.S. 277, 289-90 (1983) (emphasis in original). Far from excessive, the lifetime suspension of petitioners from the IBT, together with the bar on their receipt of future compensation from the IBT, was entirely reasonable in light of the aim of ridding the IBT of organized crime influences.

Petitioners do not assert that the decision of the court of appeals conflicts with any ruling of any other court of appeals. Moreover, the issues presented by petitioners are unique to the temporary arrangement established by the 1989 consent decree between the IBT and the United States. Under the terms of the decree, the authority of the IA and the Investigations Officer will expire this year, nine months after the recent union election results

are certified. (Consent Decree 3). This case thus presents no issue of continuing importance warranting further review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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